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THE
LAW JOURNAL REPORTS

FOR
THE YEAR 1850 :

COMPRISING
REPORTS OF CASES

IN THE COURTS OF
**Chancery and in Bankruptcy, Queen's Bench and the Bail Court,
Common Pleas,**
(Including Cases on APPEAL from the Decisions of Revising Barristers,)
Exchequer of Pleas, and Exchequer Chamber,

FROM
MICHAELMAS TERM 1849, TO TRINITY TERM 1850,
BOTH INCLUSIVE.

ALSO
*Notes of Judgments in the HOUSE of LORDS, during that Period; and a separate
arrangement of Cases relating to the DUTIES OF MAGISTRATES, including
CROWN CASES RESERVED.*

EDITED BY MONTAGU CHAMBERS, OF LINCOLN'S INN, Esq.,
ONE OF HER MAJESTY'S COUNSEL.

VOL. XXVIII.

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MDCCCL.

NAMES OF THE REPORTERS.

1850.

Lord Chancellor's Court,

EDWARD COOKE, Esq. BARRISTER-AT-LAW.

Rolls Court,

THOMAS PARKER, JUN. Esq. BARRISTER-AT-LAW.

Court of the Vice Chancellor of England,

THOMAS WYATT GUNNING, Esq. BARRISTER-AT-LAW.

Court of the First Vice Chancellor,

BENEDICT LAWRENCE CHAPMAN, Esq. BARRISTER-AT-LAW.

Court of the Second Vice Chancellor,

JOHN FITZPATRICK VILLIERS, Esq. BARRISTER-AT-LAW.

Cases in Bankruptcy,

BENEDICT LAWRENCE CHAPMAN, Esq. BARRISTER-AT-LAW.

Court of Queen's Bench,

HENRY JOHN HODGSON, Esq. and COLLEY HARMAN SCOTLAND, Esq.
BARRISTERS-AT-LAW.

Hall Court, Exchequer Chamber, and Crown Cases Reserved,

FRANCIS RUSSELL, Esq. BARRISTER-AT-LAW.

Court of Common Pleas,

THOMAS SANDERS, Esq., ALEXANDER JAMES JOHNSTON, Esq.

AND

THE HON. GEORGE DENMAN, BARRISTERS-AT-LAW.

Exchequer of Pleas,

HENRY HORN, Esq. and EDWARD WISE, Esq. BARRISTERS-AT-LAW.

CASES RELATING TO MAGISTRATES,

REPORTED PRINCIPALLY BY

HENRY JOHN HODGSON, Esq., COLLEY HARMAN SCOTLAND, Esq.

AND

FRANCIS RUSSELL, Esq. BARRISTERS-AT-LAW.

JUDGES AND LAW OFFICERS.

FROM MICHAELMAS TERM 1849, TO TRINITY TERM 1850, INCLUSIVE.

IN THE COURTS OF CHANCERY.

The Right Hon. LORD COTTENHAM, Lord High Chancellor.
The Right Hon. LORD LANGDALE.
The Right Hon. Sir LANCELOT SHADWELL, Knt. } Lords Commissioners
The Hon. Sir ROBERT MOUNSEY ROLFE, Knt. } of
The Right Hon. LORD TRURO, Lord High Chancellor. } The Great Seal.
The Right Hon. LORD LANGDALE, Master of the Rolls.
The Right Hon. Sir LANCELOT SHADWELL, Knt., Vice Chancellor of England.
The Right Hon. Sir JAMES LEWIS KNIGHT BRUCE, Knt., First Vice Chancellor.
The Right Hon. Sir JAMES WIGRAM, Knt., Second Vice Chancellor.

COURT OF APPEAL IN BANKRUPTCY.

The Right Hon. Sir JAMES LEWIS KNIGHT BRUCE, Knt., First Vice Chancellor.

IN THE COURT OF QUEEN'S BENCH.

The Right Hon. LORD DENMAN, } Lord Chief Justice.
The Right Hon. LORD CAMPBELL, }
The Hon. Sir JOHN PATTESON, Knt.
The Hon. Sir JOHN TAYLOR COLERIDGE, Knt.
The Hon. Sir WILLIAM WIGHTMAN, Knt.
The Hon. Sir WILLIAM ERLE, Knt.

IN THE COURT OF COMMON PLEAS.

The Right Hon. Sir THOMAS WILDE, Knt., Chief Justice.
The Hon. Sir WILLIAM HENRY MAULE, Knt.
The Hon. Sir CRESSWELL CRESSWELL, Knt.
The Hon. Sir EDWARD VAUGHAN WILLIAMS, Knt.
The Hon. Sir THOMAS NOON TALFOURD, Knt.

IN THE COURT OF EXCHEQUER.

The Right Hon. Sir FREDERICK POLLOCK, Knt., Chief Baron.
The Right Hon. Sir JAMES PARKE, Knt.
The Hon. Sir EDWARD HALL ALDERSON, Knt.
The Hon. Sir ROBERT MOUNSEY ROLFE, Knt.
The Hon. Sir THOMAS JOSHUA PLATT, Knt.

Sir JOHN JERVIS, Knt., Attorney General.
Sir JOHN ROMILLY, Knt., Solicitor General.

PREFERMENTS AND MEMORANDA.

IN the vacation between *Hilary* and *Easter Terms*, the Right Hon. LORD DENMAN, Lord Chief Justice of England, retired from the Bench, and the Right Hon. LORD CAMPBELL was appointed to the vacant office.

IN the same vacation, MICHAEL PRENDERGAST, Esq., H. BLISS, Esq., C. S. GREAVES, Esq., W. C. TOWNSEND, Esq., C. HOGGINS, Esq., W. C. ROWE, Esq., P. F. O'MALLEY, Esq., BARNES PEACOCK, Esq., EDWIN JAMES, Esq. and KENNETH MACAULAY, Esq. were appointed Her Majesty's Counsel learned in the law.

IN *Easter Term*, the Right Hon. LORD COTTENHAM resigned the Great Seal, which was thereupon put into commission—the Commissioners being the Right Hon. LORD LANGDALE, Master of the Rolls, the Right Hon. Sir LANCELOT SHADWELL, Vice Chancellor of England, and the Hon. Sir ROBERT MOUNSEY ROLFE, one of the Barons of the Court of Exchequer.

IN the vacation after *Trinity Term*, the Right Hon. Sir THOMAS WILDE, Lord Chief Justice of the Court of Common Pleas, was appointed Lord High Chancellor, and was created a Peer under the title of BARON TRURO. Sir JOHN JERVIS, Her Majesty's Attorney General, was appointed Lord Chief Justice of the Court of Common Pleas.

AT the same time, Sir JOHN ROMILLY, Her Majesty's Solicitor General, was appointed Attorney General, and ALEXANDER JAMES EDWARD COCKBURN, Esq., one of Her Majesty's Counsel, was appointed Solicitor General, and shortly afterwards received the honour of knighthood.

THE Vice Chancellor of England, Sir LANCELOT SHADWELL, died at his residence, Barn Elms, Surrey, in July last.

REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
Courts of Chancery.

BY
EDWARD COOKE, Esq., THOMAS PARKER, JUN. Esq.,
THOMAS WYATT GUNNING, Esq.,
BENEDICT LAWRENCE CHAPMAN, Esq.
AND
JOHN FITZPATRICK VILLIERS, Esq.
BARRISTERS-AT-LAW.

DURING FOUR TERMS,
VIZ.
MICHAELMAS 1849, HILARY, EASTER AND TRINITY, 1850.
13 & 14 VICTORIÆ.

ORDERS OF COURT.

Monday, December 10, 1849.

THE Right Honourable CHARLES CHRISTOPHER LORD COTTENHAM, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Honourable HENRY LORD LANGDALE, Master of the Rolls, and the Right Honourable Sir LANCELOT SHADWELL, Vice Chancellor of England, DOETH HEREBY ORDER AND DIRECT in manner following, that is to say,

That in all cases in which costs are ordered to be paid to a party suing or defending *in forma pauperis*, such costs shall, unless the Court shall otherwise order, be taxed as *dives* costs.

That this Order be drawn up and entered by the Registrar of the said Court.

COTTENHAM, C.

LANGDALE, M.R.

LANCELOT SHADWELL, V.C.E.

Saturday, February 23, 1850.

THE Right Honourable CHARLES CHRISTOPHER LORD COTTENHAM, Lord High Chancellor of Great Britain, DOETH HEREBY ORDER AND DIRECT, in manner following, that is to say,

That all Causes required to be heard before the Lord Chancellor, or one of the Vice-Chancellors, shall, on and after the first day of March next, be set down for hearing by the Registrars, upon production to them of the certificate of the proper officer that the same is in a fit state to be set down for hearing, without any Fiat, Order, or Direction from the Lord Chancellor for that purpose.

That on and after the said first day of March next, all Causes for further Directions, or on Equity reserved after a Trial at Law shall have been had, or the certificate of a Court of Law shall have been obtained in pursuance of a Decree or Order pronounced by the Lord Chancellor, or one of the Vice-Chancellors, and all Pleas, Demurrers, Exceptions and Objections for want of Parties required to be heard before the Lord Chancellor or one of the Vice-Chancellors, shall be set down by the Registrars for hearing on Orders drawn up by them upon Petition to the Lord Chancellor, left with the Registrar, without any Fiat or Direction from the Lord Chancellor.

That, in lieu and in stead of the Fees heretofore receivable by the Lord Chancellor's principal

Secretary on his own account, and on account of the Gentlemen of the Chamber, or of any other officer of the Court of Chancery, and paid at the office of the said principal Secretary, he shall receive and take only the Fees set out in the Schedule hereto, except as to all Petitions presented previous to the said first day of March next, the Court Fees upon which are to be paid as heretofore.

COTTENHAM, C.

SCHEDULE ABOVE REFERRED TO.

	£.	s.	d.
For every Appeal or Petition for re-hearing of a Cause	1	0	0
For every Petition for a Letter to any Peer of this Realm, and for the Letter	1	0	0
For every Petition, whether in a Cause or where no Cause is depending, including the Fee on the hearing, heretofore payable to the Gentlemen of the Chamber to the Lord Chancellor .	1	0	0
For Copies of Affidavits, 4d. per folio.			

Monday, April 22, 1850.

THE Right Honourable CHARLES CHRISTOPHER LORD COTTENHAM, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Honourable HENRY LORD LANGDALE, Master of the Rolls, the Right Honourable Sir LANCELOT SHADWELL, Vice Chancellor of England, the Right Honourable the Vice Chancellor Sir JAMES LEWIS KNIGHT BRUCE, and the Right Honourable the Vice Chancellor Sir JAMES WIGRAM, doth hereby, in pursuance of an Act of Parliament passed in the fourth year of the reign of Her present Majesty, intituled "An Act for facilitating the Administration of Justice in the Court of Chancery," and of an Act passed in the fifth year of the reign of Her present Majesty, intituled, "An Act to amend an Act of the Fourth Year of the Reign of Her present Majesty, intituled 'An Act for facilitating the Administration of Justice in the Court of Chancery,'" and of an Act passed in the eighth and ninth years of the reign of Her present Majesty, intituled "An Act for amending certain Acts of the Fourth and Fifth Years of the Reign of Her Majesty, for facilitating the Administration of Justice in the Court of Chancery, and for providing for the Discharge of the Duties of the Subpœna Office after the Death, Resignation or Removal of the present Patentee of that Office," and in pursuance and execution of all other powers enabling him in that behalf, ORDER AND DIRECT, that all and every the Rules, Orders and Directions hereinafter set forth shall henceforth be, and for all purposes be deemed and taken to be, General Orders and Rules of the High Court of Chancery; viz.

I.—Any person seeking equitable relief may, without special leave of the Court, and instead of proceeding by bill of complaint in the usual form, file a claim in the Record and Writ Clerks Office, in any of the following cases; that is to say, in any case where the plaintiff is or claims to be,

1. A creditor upon the estate of any deceased person, seeking payment of his debt out of the deceased's personal assets.
2. A legatee under the will of any deceased person, seeking payment or delivery of his legacy out of the deceased's personal assets.
3. A residuary legatee, or one of the residuary legatees, of any deceased person, seeking an account of the residue and payment and appropriation of his share therein.
4. The person or any of the persons entitled to the personal estate of any person who may have died intestate, and seeking an account of such personal estate and payment of his share thereof.
5. An executor or administrator of any deceased person, seeking to have the personal estate of such deceased person administered under the direction of the Court.
6. A legal or equitable mortgagee or person entitled to a lien as a security for a debt, seeking foreclosure or sale, or otherwise to enforce his security.
7. A person entitled to redeem any legal or equitable mortgage or any lien, seeking to redeem the same.
8. A person entitled to the specific performance of an agreement for the sale or purchase of any property, seeking such specific performance.
9. A person entitled to an account of the dealings and transactions of a partnership dissolved or expired, seeking such account.

10. A person entitled to an equitable estate or interest, and seeking to use the name of his trustee in prosecuting an action for his own sole benefit.

11. A person entitled to have a new trustee appointed in a case where there is no power in the instrument creating the trusts to appoint new trustees, or where the power cannot be exercised, and seeking to appoint a new trustee.

II.—Such claim in the several cases enumerated in Order I. is to be in the form and to the effect set forth in Schedule A. hereunder written, as applicable to the particular case, and the filing of such claim is, in all cases not otherwise provided for, to have the force and effect of filing a bill.

III.—Every such claim is to be marked at or near the top or upper part thereof in the same manner as a bill is now marked with the name of the Lord Chancellor, and one of the Vice Chancellors, or with the name of the Master of the Rolls.

IV.—Upon filing such claim the plaintiff thereby claiming may sue out a writ of summons against the defendant to the claim, requiring him to cause an appearance to be entered to such writ, and also requiring him, on a day or time to be therein named, or on the seal or motion day then next following, to shew cause, if he can, why such relief as is claimed by the plaintiff should not be had, or why such order as shall be just with reference to the claim should not be made.

V.—Such writ of summons is to be in the form and to the effect in that behalf set forth in No. 1. of Schedule B. hereunder written, with such variations as circumstances may require, and is to be sealed with the seal of the office of the Clerks of Records and Writs.

VI.—In any case, other than those enumerated in Order I., or in any case to which the forms set forth in Schedule A. are not applicable, the Court (if it shall so think fit) may, upon the *ex parte* application of any person seeking equitable relief, and upon reading the claim proposed to be filed, give leave to file such claim, and sue out a writ of summons thereon under these orders; and if such leave be given, an indorsement thereon by the registrar upon the proposed claim shall be a sufficient authority for the Record and Writ Clerk to receive and file such claim.

VII.—In the case provided for by the 5th Article of Order I. any one person who, under the 3rd or 4th Article of Order I., might have claimed relief against the executor or administrator of the deceased person whose personal estate is sought to be administered, and the co-executor or co-administrator (if any) of the plaintiff, may be named in the writ of summons as defendants to the suit: and in the first instance no other person need be therein named.

VIII.—In other cases the only person who need be named in the writ of summons as defendant to the suit in the first instance is the person against whom the relief is directly claimed.

IX.—All claims, and all writs, caveats, proceedings, directions, and orders consequent thereon, either before the Court or in the Master's offices, are to be deemed proceedings, writs and orders subject to the general rules, orders, and practice of the Court, so far as the same are or may be applicable to each particular case and consistent with these orders; and all orders of the Court made in such proceedings are to be enforced in the same manner and by the same process as orders of the Court made in a cause upon bill filed.

X.—Writs of summons are, as to the number of defendants to be named therein, as to the mode of service thereof, and as to the time and mode of entering appearances thereto, to be subject to the same rules as writs of subpœna to appear to and answer bills.

XI.—The time for shewing cause named in any writ of summons (except a writ of summons to revive or carry on proceedings) is to be fourteen days at the least after service of the writ; but, by consent of the parties, and with the leave of the Court, cause may be shewn on any earlier day.

XII.—At the time for shewing cause named in the writ, or on the seal or motion day then next following, or so soon after as the case can be heard, the defendant, having previously appeared, is personally or by counsel to shew cause in Court, if he can, (and if necessary by affidavit,) why such relief as is claimed by the claim should not be had against him.

XIII.—At the time appointed for shewing cause, upon the motion of the plaintiff, and on hearing the claim, and what may be alleged on the part of the defendant, or upon reading a certificate of the appearance being entered by the defendant, or an affidavit of the writ of summons being duly served, the Court may, if it shall think fit, make an order granting or refusing the relief claimed, or directing any accounts or inquiries to be taken or made, or other proceedings to be had, for the purpose of ascertaining the plaintiff's title to the relief

claimed; and further, the Court may direct such (if any) persons or classes of persons as it shall think necessary or fit to be summoned or ordered to appear as parties to the claim, or on any proceedings before the Master, with reference to any accounts or inquiries directed to be taken or made, or otherwise.

XIV.—Every order to be so made is to have the effect of and may be enforced as a decree or decretal order made in a suit commenced by bill, and duly prosecuted to a hearing according to the present course of the Court.

XV.—If, upon the application for any such order, or during any proceedings under any such order when made, it shall appear to the Court that for the purposes of justice between the parties it is necessary or expedient that a bill should be filed, the Court may direct or authorize such bill to be filed, subject to such terms as to costs or otherwise as may be thought proper.

XVI.—The orders made for granting relief in the several cases to which the forms set forth in Schedule A. are applicable may, if the Court thinks fit, be in the form and to the effect set forth in Schedule C. as applicable to the particular case, with such variations as circumstances may require.

XVII.—Under every Order of reference to the Master under these orders, the Master is, unless the Court otherwise orders, to be at liberty to cause the parties to be examined on interrogatories, and to produce deeds, books, papers, and writings, as he shall think fit, and to cause advertisements for creditors, and if he shall think it necessary, but not otherwise, for heirs and next-of-kin, or other unascertained persons, and the representatives of such as may be dead, to be published in the usual forms, or otherwise, as the circumstances of the case may require; and in such advertisements to appoint a time within which such persons are to come in and prove their claims, and within which time unless they so come in, they are to be excluded the benefit of the order; and in taking any account of a deceased's personal estate under any such order of reference, the Master is to inquire and state to the Court what part, if any, of the deceased's personal estate is outstanding or undisposed of, and is also to compute interest on the deceased's debts, as to such of them as carry interest after the rate they respectively carry, and as to all others after the rate of four per cent. per annum from the date of the order, and to compute interest on legacies after the rate of four per cent. per annum from the end of one year after the deceased's death, unless any other time of payment or rate of interest is directed by the will, but in that case according to the will; and under every order whereby any property is ordered to be sold with the approbation of the Master, the same is to be sold to the best purchaser that can be got for the same, to be allowed by the Master, wherein all proper parties are to join as the Master shall direct.

XVIII.—If upon the proceedings before the Master under any such order it shall appear to the Master that some persons, not already parties, ought to attend or to be enabled to attend the proceedings before him, he is to be at liberty to certify the same; and upon the production of such certificate to the Record and Writ Clerk, the plaintiff may

sue out a writ of summons requiring the persons named in such certificate to appear to the writ, and such persons are thereupon to be named and treated as defendants to the suit.

XXIX.—Such writ of summons under an order or Master's certificate is to be in the form and to the effect in that behalf set forth in No. 2. of schedule B, with such variations as circumstances may require.

XX.—The persons so summoned having appeared, are to be at liberty to attend, and to be entitled to notice of the proceedings before the Master under the order of reference, subject to such directions as the Master may make in respect thereof.

XXI.—Where any proceedings originally commenced by claim and writ of summons shall by the death of parties, or otherwise, have become abated or defective for want of parties, and no new relief is sought, a claim to revive or carry on the suit may be filed; and such claim is to be in the form set forth in No. 12. of schedule A.

XXII.—The party claiming simply to revive or carry on proceedings may sue out a writ of summons requiring the defendant thereto to appear to the writ, and to shew cause, if he can, why the proceedings should not be revived or carried on.

XXIII.—Such writ of summons is to be in the form and to the effect in that behalf set forth in No. 3. of Schedule B, with such variations as circumstances may require.

XXIV.—If any defendant to any such writ is desirous of shewing cause why the proceedings should not be revived or carried on, he is to appear and to file a *caveat* against such revivor or carrying on in the Record and Writ Clerks Office, in the form set forth in No. 4. of Schedule B, and to give notice thereof in writing to the opposite party. If no such *caveat* be filed within eight days from the time limited for his appearance to the writ, then at the expiration of such eight days the proceedings are to be revived, and may be carried on without any order for the purpose; and a certificate of the Record and Writ Clerk, that no *caveat* has been filed within the time limited is to be a sufficient authority for the Master to proceed. But if any such *caveat* be filed, the proceedings are not to be revived or carried on without an order to be obtained on motion, of which due notice is to be given.

XXV.—Where any further or supplemental relief is sought, and such supplemental relief is such as is provided for in any of the cases enumerated under Order I. a supplemental claim may be filed in such of the forms set forth in Schedule A. as is applicable to the case.

XXVI.—If such supplemental relief is not such as is provided for by Order XXV., a supplemental claim may be filed stating shortly the nature of the plaintiff's case, and the supplemental relief claimed, but the leave of the Court is to be obtained previously to the filing thereof, upon an *ex parte* application for the purpose, in the manner specified in Order VI.

XXVII.—A writ of summons may be sued out and other proceedings may be taken upon a supplemental claim in like manner as upon an original claim.

XXVIII.—Guardians *ad litem* to defend may be appointed for infants or persons of weak or unsound mind against whom any writ of summons may have issued under these orders, in like manner as guardians *ad litem* to answer and defend are now appointed in suits on bill filed.

XXIX.—Any order or proceeding made or purporting to be made in pursuance of these orders may be discharged, varied, or set aside on motion; and any order for accelerating proceedings may be made by consent.

XXX.—Any order of the Master of the Rolls or of any of the Vice Chancellors may be discharged or varied by the Lord Chancellor on motion.

XXXI.—If any of the cases enumerated in Order I. involve or are attended by such special circumstances affecting either the estate or the personal conduct of the defendant as to require special relief, the plaintiff is at liberty to seek his relief by bill as if these Orders had not been made.

XXXII.—If at any time after these Orders come into operation any suit for any of the purposes to which the forms set forth in Schedule A. are applicable shall be commenced by bill and prosecuted to a hearing in the usual course, and upon the hearing it shall appear to the Court that an order to the effect of the decree then made, or an order equally beneficial to the plaintiff, might have been obtained upon a proceeding by summons in the manner authorized by these Orders, the Court may order that the increased costs which have been occasioned by the proceeding by bill beyond the amount of costs which would have been sustained in the proceeding by summons should be borne and paid by the plaintiff.

XXXIII.—The Record and Writ Clerks are directed to take the following fees:

	£.	s.	d.
1. For filing a claim . . .	0	5	0
2. For sealing every writ of summons . . .	0	5	0
3. For filing a caveat . . .	0	2	6

For appearances, office copies, certificates, &c., the same fees as directed by the schedules of fees now in force.

The Registrars are directed to take the following fees:

	£.	s.	d.
1. For every order on the hearing of a claim, and on further directions . . .	2	0	0
2. For every office copy thereof . . .	0	10	0
3. For every order on arguing exceptions . . .	1	0	0
4. For every office copy thereof . . .	0	5	0
5. For every order for transfer out of Court, or sale of any sum of government stock, &c., exceeding 100 <i>l.</i> stock or annuities, and for every order for payment out of Court of any annuity or annuities, or of any interest or dividends upon stock or annuities, exceeding in the whole <i>5<i>l.</i></i> per annum . . .	1	10	0
6. For every office copy thereof . . .	0	10	0

ORDERS OF COURT.

Y

For every other order and office copy, the same fees as now received by the Registrars and their clerks under the schedules of fees now in force.

Solicitors are entitled to charge and be allowed the following fees:

	£.	s.	d.
For instructions to sue or defend	0	6	8
For instructions for every claim	0	13	4
For preparing and filing a claim	2	2	0
For preparing a writ of summons	0	13	4
For each writ after the first	0	6	8
For engrossing claims and writs, per fol.	0	0	6
For parchment: As paid.			
For each copy of writ to serve, per folio	0	0	4
For the brief to Counsel to move for leave to file claim (exclusive of a copy of the claim for Counsel and the Court)	0	10	0
For the brief and instructions to Counsel, on the hearing (exclusive of any necessary copies)	1	0	0
For taking instructions to appear and for entering appearance for one or more defendants, if not exceeding three	0	13	4
If exceeding three, and not more than six, an additional sum of	0	6	8
If exceeding six, for every number not exceeding three, an additional sum of	0	6	8
For settling minutes, passing and entering order on hearing: The same charges as on a decretal order.			
For entering a caveat	0	6	8
For procuring certificate of no caveat	0	6	8
For term fee: As in a suit.			

And also all such fees as by the present practice of the Court they are entitled to, save such as are varied or rendered unnecessary by these present Orders.

XXXIV.—These Orders shall come into operation on the 22nd day of May, 1850.

XXXV.—In these Orders and the Schedules the following words have the several meanings hereby assigned to them, over and above their several ordinary meanings, unless there be something in the subject or context repugnant to such construction; viz.,

1. Words importing the singular number include the plural number, and words importing the plural number include the singular number:
2. Words importing the masculine gender include females:
3. The word "affidavit" includes "affirmation" and "declaration on honour":
4. The word "person" or "party" includes a body politic or corporate:
5. The word "legacy" includes "an annuity" and a specific as well as a pecuniary legacy:
6. The word "legatee" includes "a person interested in a legacy":
7. The expression "residuary legatee" includes "a person interested in the residue."

SCHEDULE A.

Forms of Claim.

1. By a Creditor upon the estate of a deceased person, seeking payment of his debt out of the deceased's personal assets.

In Chancery.

[Lord Chancellor],
[Vice-Chancellor of England, or Vice Chancellor, naming him],
or,
[Master of the Rolls].

Between A. B., Plaintiff.
E. F., Defendant.

The claim of A. B. of the above-named plaintiff. The said A. B. states, that C. D., late of deceased, was at the time of his death, and that his estate still is, justly indebted to him the said A. B. in the sum of £ for goods sold and delivered by the said A. B. to the said C. D. [or otherwise, as the case may be, or if the debt is secured by any written instrument, state the date and nature thereof.] And that the said C. D. died in or about the month of and that the above-named defendant E. F. is the executor [or administrator] of the said C. D., and that the said debt hath not been paid; and therefore the said A. B. claims to be paid the said debt or sum of £ with his costs of this suit, and in default thereof he claims, to have the personal estate of the said C. D. administered in this court on behalf of himself and all other the unsatisfied creditors of the said C. D., and for that purpose that all proper directions may be given and accounts taken.

Note.—This form may be varied, according to the circumstances of the case, where the claimant is not the original creditor, but has become interested in or entitled to the debt; in which case the character in which he claims is to be stated.

2. By a Legatee under the will of any deceased person, seeking payment or delivery of his legacy, out of the testator's personal assets.

In Chancery.

[Lord Chancellor],
[Vice-Chancellor of England, or Vice Chancellor, naming him],
or,
[Master of the Rolls].

Between A. B., Plaintiff.
C. D., Defendant.

The claim of A. B. of the above-named plaintiff. The said A. B. states, that he is a legatee to the amount of £, under the will dated the day of of late of deceased, who died on the day of and that the above-named C. D. is the executor of the said and that the said legacy of £, together with interest thereon after the rate of £ per cent. per annum from the day of [the day mentioned in the will for the payment of the legacy, or the expiration of twelve calendar months after the said testator's death,] is now due and owing to him the said A. B., [or still unpaid or unsatisfied,] [or unappropriated or unsecured,] and the said A. B. therefore claims to be

paid [or satisfied] the said legacy and interest, [or to have the said legacy and interest appropriated and secured,] and in default thereof he claims to have the personal estate of the said administered in this court, on behalf of himself and all other the legatees of the said and for that purpose that all proper directions may be given and accounts taken.

Note.—This form may be varied, according to the circumstances of the case, where the legacy is an annuity, or specific, or where the plaintiff is not the legatee, but has become entitled to or interested in the legacy; in which case the character in which the plaintiff claims is to be stated.

3. By a Residuary Legatee, or any of several residuary legatees, of any deceased person, seeking an account of the residue, and payment or appropriation of his share therein.

In Chancery.

[Lord Chancellor],

[Vice-Chancellor of England, or Vice-Chancellor, naming him],

or,

[Master of the Rolls].

Between A.B., Plaintiff

C.D., Defendant.

The claim of A.B. of the above-named plaintiff. The said A.B. states, that he is the residuary legatee [or one of the residuary legatees] under the will dated the day of late of who died on the day of and that the above-named defendant C.D. is the executor of the said and that the said C.D. hath not paid to the said A.B. the [or his share of the] residuary personal estate of the said testator; the said A.B. therefore claims to have the personal estate of the said administered in this court, and to have his costs of this suit, and for that purpose that all proper directions may be given and accounts taken.

Note.—This form may be varied according to the circumstances of the case, where the plaintiff is not the residuary legatee, but has become entitled to or interested in the residue, in which case the character in which he claims is to be stated.

4. By the person, or any of the persons, entitled to the personal estate of any person who may have died intestate, and seeking an account of such personal estate and payment of his share thereof.

In Chancery.

[Lord Chancellor],

[Vice-Chancellor of England, or Vice-Chancellor, naming him],

or,

[Master of the Rolls].

Between A.B., Plaintiff

C.D., Defendant.

The claim of A.B. of the above-named plaintiff. The said A.B. states, that he is the next-of-kin [or one of the next-of-kin], according to the statutes for the distribution of the personal

estate of intestates, of late of who died on the day of intestate; and that the said A.B. is entitled to [or to a share of] the personal estate of the said deceased, and that the said defendant C.D. is the administrator of the personal estate of the said and that the said C.D. has not accounted for or paid to the said A.B. the [or the said A.B.'s share of the] personal estate of the said intestate. The said A.B. therefore claims to have the personal estate of the said administered in this court, and to have his costs of this suit; and for that purpose that all proper directions may be given and accounts taken.

5. By the executor or administrator of a deceased person, claiming to have the personal estate of the testator administered under the direction of the Court.

In Chancery.

[Lord Chancellor],

[Vice Chancellor of England, or Vice Chancellor, naming him],

or,

[Master of the Rolls].

Between A.B., Plaintiff

C.D., Defendant.

The claim of A.B. of . The said A. B. states, that he is the executor [or administrator] of E.F., late of but now deceased, who departed this life on or about and that he hath possessed the personal estate of the said E. F. to some amount, and that he is willing and desirous to account for the same, and that the whole of the personal estate of the said E.F. should be duly administered in this court for the benefit of all persons interested therein or entitled thereto; and that C.D. is interested in the said personal estate as one of the next-of-kin [or residuary legatee] of the said E.F., and the said A.B. claims to have the personal estate of the said E.F. applied in a due course of administration under the direction of this Court, and in the presence of the said C.D. and such other persons interested in the said estate as this Court may be pleased to direct, or that the said C.D. may shew good cause to the contrary: And that the costs of this suit may be provided for; and for these purposes, that all proper directions may be given and accounts taken.

6. By a legal or equitable mortgagee or person entitled to a lien as security for a debt, seeking foreclosure or sale, or otherwise to enforce his security.

In Chancery.

[Lord Chancellor],

[Vice Chancellor of England, or Vice Chancellor, naming him],

or,

[Master of the Rolls].

Between A.B., Plaintiff

C.D., Defendant.

The claim of A.B. of the above-named plaintiff. The said A.B. states, that under, or by virtue of an indenture [or other document]

dated the day of , and made between [parties], [and a transfer thereof made by indenture dated the day of , and made between [parties], the said A.B. is a mortgagee [or an equitable mortgagee] of [or is entitled to a lien upon] certain freehold property [or copyhold, or leasehold, or other property, as the case may be], therein comprised, for securing the sum of pounds and interest, and that the time for payment thereof has elapsed, and that the above-named C.D. is entitled to the equity of redemption of the said mortgaged premises [or the premises subject to such lien], and the said A.B. therefore claims to be paid the said sum of pounds and interest, and the costs of this suit, and in default thereof he claims to foreclose the equity of redemption of the said mortgaged premises [or to have the said mortgaged premises sold, or to have the premises subject to such lien sold, as the case may be], and the produce thereof applied in or towards payment of his said debt and costs, and for that purpose to have all proper directions given and accounts taken.

7. By a person entitled to the redemption of any legal or equitable mortgage, or any lien, seeking to redeem the same.

In Chancery.

[Lord Chancellor],
[Vice Chancellor of England, or Vice Chancellor, naming him],

or,

[Master of the Rolls].

Between A.B., Plaintiff.

C.D., Defendant.

The claim of A.B. of the above-named plaintiff. The said A.B. states, that under or by virtue of an indenture [or other document], dated the day of and made between [parties], [and the assurances hereinafter mentioned that is to say, an indenture dated the day of], the said A.B. is entitled to the equity of redemption of certain freehold property [or copyhold, or leasehold, or other property, as the case may be], therein comprised, which was originally mortgaged [or pledged] for securing the sum of pounds and interest; and that the above-named defendant C.D. is now, by virtue of the said indenture, dated the day of [and of subsequent assurances], the mortgagee of the said property [or holder of the said lien], and entitled to the principal money and interest remaining due upon the said mortgage [or lien]; and he believes that the amount of principal money and interest now due upon the said mortgage [or lien] is the sum of pounds or thereabouts; and that the said A.B. hath made or caused to be made an application to the said C.D. to receive the said sum of pounds, and any costs justly payable to him, and to reconvey to the said A.B. the said mortgaged property [or property subject to the said lien], upon payment thereof, and of any costs due to him in respect of the said security, but that the said C.D. has not so done; and therefore the said A.B. claims to be entitled to redeem the said mortgaged property [or property subject to the said lien], and to have the same reconveyed [or delivered up]

to him, upon payment of the principal money and interest and costs due and owing upon the said mortgage [or lien], and for that purpose to have all proper directions given and accounts taken.

8. By a person entitled to the specific performance of an agreement for the sale or purchase of any property, seeking such specific performance.

In Chancery.

[Lord Chancellor],
[Vice Chancellor of England, or Vice-Chancellor, naming him],

or,

[Master of the Rolls].

Between A. B., Plaintiff

C.D., Defendant.

The claim of A.B. of the above-named plaintiff. The said A.B. states, that by an agreement dated the day of and signed by the above-named defendant C.D., he, the said C.D., contracted to buy of him [or to sell to him] certain freehold property [or copyhold, leasehold, or other property, as the case may be,] therein described or referred to, for the sum of pounds; and that he has made or caused to be made an application to the said C.D. specifically to perform the said agreement on his part, but that he has not done so, and the said A.B. therefore claims to be entitled to a specific performance of the said agreement, and to have his costs of this suit; and for that purpose to have all proper directions given. And he hereby offers specifically to perform the same on his part.

9. By a person entitled to an account of the dealings and transactions of a partnership dissolved or expired, seeking such account.

In Chancery.

[Lord Chancellor],
[Vice Chancellor of England, or Vice Chancellor, naming him],

or,

[Master of the Rolls].

Between A.B., Plaintiff

C.D., Defendant.

The claim of A.B. of the above-named plaintiff. The said A.B. states, that from the day of down to the day of he and the above-named C.D. carried on the business of in copartnership, under certain articles of copartnership, dated the day of and made between [parties] [or without articles, as the case may be]; and he saith that the said partnership was dissolved [or expired, as the case may be,] on the day of and he claims an account of the partnership dealings and transactions between him and the said C. D., and to have the affairs and business of the said partnership wound up and settled under the direction of this Court, and for that purpose that all proper directions may be given and accounts taken.

10. By a person entitled to an equitable estate or interest, and claiming to use the name of his trustee in prosecuting an action for his own sole benefit.

In Chancery.

[Lord Chancellor],
[Vice Chancellor of England, or Vice Chancellor, naming him],
or,
[Master of the Rolls].

Between A.B., Plaintiff
C.D., Defendant.

The claim of A.B. of the above-named plaintiff. The said A.B. states that under an indenture dated the day of and made between [parties] he is entitled to an equitable estate or interest in certain property therein described or referred to, and that the above-named defendant is a trustee for him of such property, and that being desirous to prosecute an action at law against in respect of such property, he has made or caused to be made an application to the said defendant to allow him to bring such action in his name, and has offered to indemnify him against the costs of such action, but that the said defendant has refused or neglected to allow his name to be used for that purpose; and the said A.B. therefore claims to be allowed to prosecute the said action in the name of the said defendant, and hereby offers to indemnify him against the costs of such action.

11. By a person entitled to have a new trustee appointed in a case when there is no power in the instrument creating the trust to appoint new trustees, or when the power cannot be exercised, and seeking to appoint a new trustee.

In Chancery.

[Lord Chancellor],
[Vice Chancellor of England, or Vice Chancellor, naming him],
or,
[Master of the Rolls].

Between A.B., Plaintiff
C.D., Defendant.

The claim of A.B. of the above-named plaintiff. The said A.B. states that under an indenture dated the day of and made between [parties] [or will of or other document, as the case may be], he the said A.B. is interested in certain trust property therein mentioned or referred to, and that the above-named defendant C.D. is the present trustee of such property [or is the real or personal representative of the last surviving trustee of such property, as the case may be]; and that there is no power in the said indenture [or will or other document] to appoint new trustees [or that the power in the said indenture [or other document] to appoint new trustees cannot be executed]; and the said A.B. therefore claims to have new trustees appointed of the said trust property in the place of [or to act in conjunction with] the said C.D.

12. By a party entitled to revive or to carry on a suit, and seeking to revive or carry on the suit.

In Chancery.

[Lord Chancellor],
[Vice Chancellor of England, or Vice-Chancellor, naming him],
or,
[Master of the Rolls].

As in
original
claim.

Between A.B., Plaintiff.
&
C.D., Defendant.
and

Title of this claim. Between G.H. Plaintiff.

&
K.L., Defendant.

The claim of G.H. of the above-named plaintiff. The said G.H. states, that the said A.B. filed his claim in this suit on or about ; that on or about the said A.B. died [or became bankrupt or insolvent]; that the said suit, and all proceedings thereunder, have thereby become abated [or defective]; that the said G.H. has become and is the executor [or administrator, or the assignee of the estate and effects] of the said A.B., and he claims to be entitled to revive the said suit and proceedings [or to be entitled to carry on the said suit and proceedings], and to have all such relief as the said A.B. would have been entitled to if he had lived [or had not become bankrupt or insolvent]; or that the said C.D. ought to shew good cause to the contrary.

Note.—This form may be applied to any case to which Order XXI. applies, and may be varied according to the circumstances of each case.

SCHEDULE B. (No. 1.)

Form of Writ of Summons on Claim.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to C.D. greeting: Whereas A.B. hath caused to be filed with the Record and Writ Clerks of Our High Court of Chancery, a claim as follows [claim to be set forth verbatim]; therefore We command you [and every of you, where there is more than one defendant], that within eight days after the service or this writ on you, exclusive of the day of such service, laying all excuses and other matters aside, you do cause an appearance to this writ to be entered for you in Our High Court of Chancery; and further, that on the fourteenth day after the service of this writ, or on the seal or motion day then next following, you do, personally or by your counsel, appear in the Court of Our Lord Chancellor before the Vice-Chancellor of England [or the Vice-Chancellor, naming him], [or in the Court of our Master of the Rolls], at ten of the clock in the forenoon, and then and there shew cause, if you can, why the said A.B. should not have such relief against you as is claimed by the said claim, or why such order as shall be just with reference to the claim should not be made; and hereof fail not at your peril.

Witness Ourselves at Westminster the day
of in the year of Our reign.
[*The following memorandum to be placed at the foot.*]
Appearance to be entered at the Record and
Writ Clerks Office in Chancery Lane, London;
and if you neglect to enter your appearance, and
either personally or by your counsel to appear in
the High Court of Chancery, at the place and on
the day and hour above mentioned, you will be
subject to such order as the Court may think fit to
make against you in your absence for payment or
satisfaction of the said claim, or as the nature and
circumstances of the case may require.

SCHEDULE B. (No. 2.)

Victoria, &c., to , greeting.
Whereas A.B. hath caused to be filed
a claim against (D), claiming, &c. [*set forth only
the claim, without the introductory statement*]. And
whereas by an order made in the said cause dated
the day of it was ordered
And whereas Mr. the Master to whom
the said order stands referred, hath, by his certifi-
cate dated the day of certified to
us, that you ought to be a party to the said cause,
and to be served with a writ of summons therein;
therefore We command you, that within eight days
after service of this writ on you, exclusive of the
day of such service, you do cause an appearance
to be entered for you in Our High Court of Chan-
cery, and that you do attend the proceedings in the
said cause as a party defendant thereto, and do
and observe such things as are by Our said Court
ordered and directed in the said cause: and herein
fail not. Witness, &c.
[*The following memorandum to be placed at the foot.*]
Appearance to be entered at the Record and
Writ Clerks Office, Chancery Lane, London; and
if you neglect to appear, the proceedings will be
carried on without further notice to you.

SCHEDULE B. (No. 3.)

Victoria, &c., to , greeting.
Whereas A.B. hath caused to be filed a
claim against C.D., claiming, &c. [*set forth the
claim verbatim.*]
And whereas the said A.B. hath departed this
life, [*or become bankrupt*] [*or as the case may be,*]
whereby the said suit hath become abated [*or
defective*], and G.H. is now the legal personal
representative [*or assignee*] of the said A.B., and
and as such claims to be entitled to revive [*or
carry on*] the said suit; therefore We command
you, the said C.D., that within eight days after the
service of this writ on you, exclusive of the day of
such service, you do cause an appearance to be
entered for you in Our High Court of Chancery,
and further, that within sixteen days after such
service you do shew good cause, if you can, why
the suit, and all proceedings thereunder, should
not be revived against you, and be in the same
plight and condition as the same were in at the
time of the said abatement thereof [*or why the suit
and proceedings should not be carried on against you
as claimed*]. Witness, &c.

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[*The following memorandum to be placed at the foot.*]
Appearance to be entered at the Record and Writ
Clerks Office, in Chancery Lane, London; and if
you desire to shew cause, you are to enter a caveat
at the same office within the time limited, otherwise
the suit will stand revived, or may be carried on,
without further order.

SCHEDULE B. (No. 4.)

Form of Caveat against Revivor.

Between A.B., Plaintiff
C.D., Defendant.
And between G.H., Plaintiff
K.L., Defendant.

The said K.L. objects to the suit in the plaintiff's
claim mentioned being revived [*or carried on*]
against him in the manner claimed by the plaintiff.

SCHEDULE (C).

1. Form of Order for Payment of a Debt or Legacy.

In Chancery.

[Lord Chancellor],

[Vice Chancellor of England, or Vice Chan-
cellor, naming him],

or,

[Master of the Rolls].

Date.

Between A.B., Plaintiff.

C.D., Defendant.

Upon motion this day made unto this Court by
Mr. of counsel for the plaintiff, and upon
hearing Mr. of counsel for the defendant
[*or upon reading a certificate of an appearance having
been entered by the defendant*], [*or upon hearing an
affidavit of service upon the defendant of the writ of
summons issued in this cause*], and upon reading the
claim filed in this cause on the day of
[*and an affidavit of filed in
this cause*], [*or the defendant by his counsel admitting
assets of the testator or intestate in the said claim
named*], this Court doth order that the defendant
do, within a month after service upon him of this
order, pay to the plaintiff the sum of £
together with interest thereon, at the rate of £
per cent. per annum, from the day of
to the time of such payment, together
with the costs of this suit, to be taxed by the
Taxing Master in rotation.

2. Form of Order on Executor or Administrator to
account, on Claim by a Creditor of Testator or
Intestate.

In Chancery.

[Lord Chancellor],

[Vice Chancellor of England, or Vice Chan-
cellor, naming him],

or,

[Master of the Rolls].

Date.

Between A.B., Plaintiff.

C.D., Defendant.

ORDERS OF COURT.

Upon motion, &c. [*as in Form No. 1*] this Court doth declare that all persons who are creditors of the said testator or intestate are entitled to the benefit of this Order, and it is ordered that it be referred to the Master of this Court in rotation to take an account of what is due to the plaintiff, and all other the creditors of deceased, the testator [*or intestate*] in the plaintiff's claim named, and of his funeral expenses: And it is ordered, that the Master do take an account of the personal estate of the said testator [*or intestate*] come to the hands of the said defendant, his executor [*or administrator*], or to the hands of any other person or persons by his order or for his use: And it is ordered, that the said testator's [*or intestate's*] personal estate be applied in payment of his debts and funeral expenses in a due course of administration; and this Court doth reserve the consideration of all further directions, and of the costs of this suit, until after the said Master shall have made his report.

3. Form of Order to account on Claim by a Legatee.

In Chancery.

[Lord Chancellor],
[Vice Chancellor of England, or Vice Chancellor, naming him],
or,

[Master of the Rolls].

Date.

Between A.B., a legatee of } Plaintiff.
deceased

C.D. Defendant.

Upon motion, &c. [*as in Form No. 1*] this Court doth declare, that all persons who are legatees of the said testator are entitled to the benefit of this Order. And it is ordered, that it be referred to the Master of this Court in rotation to take an account of the personal estate not specifically bequeathed of deceased, the testator in the plaintiff's claim named, come to the hands of the defendant, or to the hands of any other person or persons by his order or for his use: And it is ordered that the said Master do take an account of the said testator's debts, funeral expenses, and of the legacies given by his will. And it is ordered, that the said testator's said personal estate be applied in payment of his funeral expenses and debts in a due course of administration, and then in payment of his legacies. And this Court doth reserve the consideration of all further directions, and of the costs of this suit, until after the said Master shall have made his report.

4. Form of Order to account, on Claim by a Residuary Legatee, or one of several Residuary Legatees.

In Chancery.

[Lord Chancellor],
[Vice Chancellor of England, or Vice Chancellor, naming him],
or,

[Master of the Rolls].

Date.

Between A.B., a residuary } Plaintiff.
legatee of deceased

C.D. Defendant.

Upon motion, &c. [*as in Form No. 1*] this Court doth declare, that all the residuary legatees named or described in the will of deceased, the testator named in the plaintiff's claim, are entitled to the benefit of this Order, and to attend the proceedings under the same before the Master; and it is referred to the Master to inquire and state to the Court who were the residuary legatees of the testator living at the time of his death, and whether any of them are since dead, and if dead who is or are their legal personal representative or representatives; and if the Master shall find that all such residuary legatees, or their legal personal representatives, have been duly served with writs of summons, he is to proceed to take an account, &c. [*as in No. 3, to the end*].

5. Form of Order to account on Claim by the next-of-kin, or one of the next-of-kin, of an Intestate.

In Chancery.

[Lord Chancellor],
[Vice Chancellor of England, or Vice Chancellor, naming him],
or,

[Master of the Rolls].

Date.

Between A.B., Plaintiff.

C.D., Defendant.

Upon motion, &c. [*as in Form No. 1*] this Court doth declare, that all the next-of-kin, according to the Statutes of Distribution, of the intestate named in the plaintiff's claim, are entitled to the benefit of this Order, and to attend the proceedings before the Master under the same; and it is referred to the Master of this Court in rotation to inquire and state to the Court who were the next-of-kin, according to the Statutes of Distribution, of the said living at the time of his decease, and whether any of them are since dead, and if dead, who is or are their legal personal representative or representatives; and if the said Master shall find that such next-of-kin have been duly served with writs of summons to attend the proceeding before him under this Order, then it is ordered, that it be referred to the said Master to take an account of the said intestate's personal estate [*usual accounts of personal estate, debts, and funeral expenses, &c., as in Form No. 3.*]

6. Form of Order for Account of Personal Estate of a Deceased Person on the claim of the Executor or Administrator.

In Chancery.

[Lord Chancellor],
[Vice-Chancellor of England, or Vice-Chancellor, naming him],
or,

[Master of the Rolls].

Date.

Between A.B., Plaintiff.

C.D., Defendant.

Upon motion, &c. [*as in Form No. 1*] this Court doth declare, that all persons interested in the personal estate of the said testator [*or intestate*] are

entitled to the benefit of this Order, and it is ordered that it be referred to the Master to take an account of the testator's [or *intestate's*] personal estate possessed by the plaintiff or by any other person by his order or for his use, and also to take an account of the testator's [or *intestate's*] funeral expenses, debts, and legacies; and it is ordered, that such personal estate be applied in a due course of administration in payment of such funeral expenses, debts, and legacies; and any further directions which may be necessary are hereby reserved, &c.

7. *Form of Order of Foreclosure on Claim by a legal or equitable Mortgagee.*

In Chancery.

[Lord Chancellor],
[Vice-Chancellor of England, or Vice-Chancellor, naming him],

or,

[Master of the Rolls].

Date.

Between A. B., Plaintiff
C. D., Defendant.

Upon motion, &c. [as in Form No. 1] this Court doth order, that it be referred to the Master of this Court in rotation, to take an account of what is due to the plaintiff for principal and interest on the mortgage [or *equitable mortgage*] in the plaintiff's claim mentioned; And it is ordered, that it be referred to the Taxing Master in rotation to tax the plaintiff his costs of this suit: And upon the defendant paying to the plaintiff what shall be reported due to him for principal and interest as aforesaid, together with the said costs when taxed, within six months after the said Master shall have made his report, at such time and place as the said Master shall appoint, it is ordered, that the plaintiff [do reconvey the mortgaged premises in the plaintiff's affidavit of claim mentioned, free and clear of all incumbrances done by him, or any claiming by, from, or under him, and] do deliver up all deeds and writings in his custody or power relating thereto, upon oath, to the said defendant, or to whom he shall appoint; but in default of the defendant paying unto the plaintiff such principal, interest, and costs as aforesaid, by the time aforesaid it is ordered, that the defendant [do stand absolutely debarred and foreclosed of and from all equity of redemption of, in, and to the said mortgaged premises] do convey to the plaintiff the premises comprised in the equitable mortgage in the plaintiff's affidavit of claim mentioned, free and clear of all right, title, interest, and equity of redemption of, in, and to the said premises; and the Master is to settle the conveyance if the parties differ about the same.

8. *Form of Order of Sale on Claim by a legal or equitable Mortgagee or Person entitled to a Lien.*

In Chancery.

[Lord Chancellor],
[Vice Chancellor of England, or Vice Chancellor, naming him],

or,

[Master of the Rolls].

Date.

Between A. B., Plaintiff
C. D., Defendant.

Upon motion, &c. [as in Form No. 1] this Court doth order, that it be referred to the Master of this Court in rotation to take an account of what is due to the plaintiff for principal and interest on the mortgage [or *equitable mortgage or lien*] in the plaintiff's claim mentioned: And it is ordered, that it be referred to the Taxing Master in rotation to tax the plaintiff his costs of this suit: And upon the defendant paying to the plaintiff what shall be reported due to him for principal and interest as aforesaid, together with the said costs, within six months after the said Master shall have made his report, at such time and place as the said Master shall appoint, it is ordered, that the plaintiff [do reconvey the mortgaged premises in the plaintiff's affidavit of claim mentioned, free and clear of all incumbrances done by him, or any claiming by, from, or under him, and] do deliver up all deeds and writings in his custody or power relating thereto, upon oath, to the defendant, or to whom he shall appoint; but in default of the defendant paying to the plaintiff such principal, interest, and costs as aforesaid, by the time aforesaid, then it is ordered, that the said mortgaged premises [or the premises subject to the said equitable mortgage or lien] be sold, with the approbation of the said Master: And it is ordered, that the money to arise by such sale be paid into court to the end that the same may be duly applied in payment of what shall be found due to the plaintiff for principal, interest, and costs as aforesaid; and this Court doth reserve the consideration of all further directions until after the said Master shall have made his report.

9. *Form of an Order for Redemption on Claim by Person entitled to redeem.*

In Chancery.

[Lord Chancellor],
[Vice-Chancellor of England, or Vice-Chancellor, naming him],

or,

[Master of the Rolls].

Date.

Between A. B., Plaintiff
C. D., Defendant.

Upon motion, &c. [as in Form No. 1.] this Court doth order, that it be referred to the Master in rotation to take an account of what is due to the defendant for principal and interest on his mortgage [or *equitable mortgage or lien*] in the plaintiff's claim mentioned: And it is ordered, that it be referred to the Taxing Master in rotation to tax the defendant his costs of this suit: And upon the plaintiff paying to the defendant what shall be reported due to him for principal and interest, together with such costs, when taxed, within six months after the said Master shall have made his report, at such time and place as the said Master shall appoint, this Court doth order, that the defendant do reconvey the mortgaged premises [or deliver up possession of the property subject to the equitable mortgage or lien] in the plaintiff's claim mentioned, free and clear from all incumbrances done by him, or any claiming by, from, or under him, and do deliver up all deeds and writings in his custody or power relating thereto, upon oath, to the plaintiff or to whom he shall appoint, but in default thereof the plaintiff's said claim is to stand

ORDERS OF COURT.

dismissed out of this court, with costs, to be taxed by the said Taxing Master, and to be paid by the plaintiff to the defendant.

10. *Form of Order of Reference of Title, on Claim of Person seeking Specific Performance.*

In Chancery.

[Lord Chancellor],
[Vice-Chancellor of England, or Vice-Chancellor, naming him],

or,
[Master of the Rolls].

Date.

Between A. B., Plaintiff,
C. D., Defendant.

Upon motion, &c. [as in Form No. 1] this Court doth order, that it be referred to the Master of this Court in rotation to inquire whether a good title can be made to the property comprised in the agreement in the said plaintiff's claim mentioned; and in case the said Master shall be of opinion that a good title can be made, it is ordered, that he do state at what time it was first shewn that such good title could be made; and this Court doth reserve the consideration of all further directions, and of the costs of this suit, until after the said Master shall have made his report.

11. *Form of Order for an Account of Partnership Dealings and Transactions on Claim of Person entitled to the Account.*

In Chancery.

[Lord Chancellor],
[Vice-Chancellor of England, or Vice-Chancellor, naming him],

or,
[Master of the Rolls].

Date.

Between A. B., Plaintiff,
C. D., Defendant.

Upon motion, &c. [as in Form No. 1] this Court doth order, that it be referred to the Master of this Court in rotation to take an account of the partnership dealings and transactions between the plaintiff and the defendant from the day of : And it is ordered, that what upon taking the said account shall be found due from either of the said parties to the other of them be paid by the party from whom to the party to whom the same shall be found due; [and this Court doth reserve the consideration of all further directions, and of the costs of this suit, until after the said Master shall have made his report.]

12. *Form of an Order on Claim by a Person claiming to use the Name of his Trustee.*

In Chancery.

[Lord Chancellor],
[Vice Chancellor of England, or Vice Chancellor, naming him],

or
[Master of the Rolls].

Date.

Between A. B., Plaintiff,
C. D., Defendant.

Upon motion, &c. [as in Form No. 1] this Court doth order, that the plaintiff be at liberty to use the name of the defendant in prosecuting the action at law in the plaintiff's claim mentioned, on indemnifying the defendant against the costs of such action: And it is ordered, that it be referred to the Master of this Court in rotation to settle the indemnity to be given by the plaintiff to the defendant, in case the parties differ about the same.

13. *Form of Order on Claim for the Appointment of new Trustees.*

In Chancery.

[Lord Chancellor],
[Vice Chancellor of England, or Vice Chancellor, naming him],

or
[Master of the Rolls].

Date.

Between A. B., Plaintiff,
C. D., Defendant.

Upon motion, &c. [as in Form No. 1] this Court doth order, that it be referred to the Master of this Court in rotation to appoint proper persons to be new trustees under the indenture [or will or other instrument] in the plaintiff's claim mentioned, in the place of [or to act in conjunction with] the defendant: And it is ordered that the defendant do convey [assign or transfer] the trust fund or property [referring to it] to such new trustees [or so as to vest the same in such new trustees jointly with himself], upon the trusts of the said indenture [or will or other document], or such of them as are now subsisting and capable of taking effect, and they are to declare the trusts thereof accordingly, such conveyance [or assignment] to be settled by the said Master, in case the parties differ about the same: [And it is ordered, that the defendant do deliver over to such new trustees all deeds and writings in his custody or power relating to the said trust property.]

COTTENHAM, C.

LANGDALE, M.R.

LANCELOT SHADWELL, V.C.E.

J. L. KNIGHT BRUCE, V.C.

JAMES WIGRAM, V.C.

Monday, June 3, 1850.

THE Right Honourable CHARLES CHRISTOPHER LORD COTTENHAM, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Honourable HENRY LORD LANGDALE, Master of the Rolls, the Right Honourable Sir LANCELOT SHADWELL, Vice Chancellor of England, the Right Honourable the Vice Chancellor Sir JAMES LEWIS KNIGHT BRUCE, and the Right Honourable the Vice Chancellor Sir JAMES WIGRAM, doth hereby, in pursuance of an Act of Parliament passed in the fourth year of the reign of Her present Majesty, intituled "An Act for facilitating the Administration of Justice in the Court of Chancery," and of an Act passed in the fifth year of the reign of Her present Majesty, intituled, "An Act to amend an Act of the Fourth Year of the Reign of Her present Majesty, intituled 'An Act for facilitating the Administration of Justice in the Court of Chancery,'" and of an Act passed in the eighth and ninth years of the reign of Her present Majesty, intituled "An Act for amending certain Acts of the Fourth and Fifth Years of the Reign of Her Majesty, for facilitating the Administration of Justice in the Court of Chancery, and for providing for the Discharge of the Duties of the Subpœna Office after the Death, Resignation or Removal of the present Patentee of that Office," and in pursuance and execution of all other powers enabling him in that behalf, ORDER AND DIRECT, that all and every the Rules, Orders and Directions hereinafter set forth shall henceforth be, and for all purposes be deemed and taken to be, General Orders and Rules of the High Court of Chancery; viz.

I.—Every decree or order of reference is to be brought into the Master's office by the party having the carriage thereof, within ten days after the same shall have been passed and entered, and in default thereof any other party to the cause or matter is to be at liberty to bring in the same, and such party shall have the carriage of the proceedings under such decree or order, unless the Master shall otherwise specially direct.

II.—If upon the warrant taken out for considering the decree or order of reference, or at any time during the reference, it shall appear to the Master, with respect to the whole or any portion of the proceedings, that the interests of the parties can be classified, he is to be at liberty to require the persons constituting each or any class to be represented by the same solicitor; and if the parties constituting such class cannot agree upon the solicitor to represent them, the Master is to be at liberty to nominate such solicitor for the purpose of the proceedings before him; and if any of the parties constituting such class shall decline to authorize the solicitor so nominated to act for him, and shall insist upon being represented by a different solicitor, such party shall personally pay the costs of his own solicitor of and relating to the proceedings before the Master with respect to which such nomination shall have been made, and all such further costs as shall be occasioned to any of the parties by his being represented by a different solicitor from the solicitor so to be nominated.

III.—The arrangement and regulation of the course of proceedings under each reference are to be wholly subject to the controul and direction of the Master, and the Master is to proceed with the

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reference made to him as speedily as the nature thereof and the business of the office will allow.

IV.—The duration of warrants to proceed upon any reference before the Master, is not to be limited to an hour, or any other period of time; and the proceedings upon any warrant are, as far as possible, to be continued consecutively from hour to hour, and from day to day, until the same shall be completed, but not so as to cause unreasonable delay in other causes or matters depending before the Master; and the Master shall therefore be at liberty to adjourn the further hearing of any matter or thing before him, to such future day as he shall think fit; and on every such adjournment the parties shall be obliged to attend without a further warrant, unless the Master shall otherwise direct.

V.—The Master shall give priority, as far as may be, to exceptions for insufficiency, impertinence, and scandal, and to matters and applications under 3 & 4 Will. 4. c. 94. s. 13, and the Orders made in pursuance thereof, and to any other matters or applications requiring immediate despatch.

VI.—The Master's power to proceed *ex parte*, in case of the non-attendance of any party on any warrant, shall extend to the case of his non-attendance upon any adjournment of any warrant.

VII.—The Master's power to award costs in case of the non-attendance of any party upon any warrant, is to extend to the case of his non-attendance upon any adjournment of any warrant to a fixed time.

VIII.—In all cases when a proceeding has been

unduly delayed, by reason of the neglect of any party or his solicitor, the Master shall, in the first report which he shall make on the subject-matter, in respect of which such proceeding has been unduly delayed, state specially to the Court the circumstances of such delay, in order that the Court may, if it shall so think fit, in addition to and notwithstanding any costs which the Master may have certified to be paid in the course of the proceedings before him, make such further order in respect thereof as justice shall require.

IX.—If it shall appear to the Master that any state of facts, affidavit, or other proceeding before him, contains statements which are impertinent or of unnecessary length, he shall be at liberty (without any application made to him for the purpose) to disallow such matter, distinguishing by his initials in the margin the parts so disallowed; and he shall cause a memorandum of his having disallowed such impertinent matter to be indorsed on the office copies of the draft of his report, as to the particular inquiry on which such state of facts, affidavit, or other proceeding shall have been used before him; and in the taxation of costs, no costs shall be allowed to the parties by or on whose behalf such state of facts, affidavit, or other proceeding was brought into the Master's office, for or in respect of the matter so disallowed, and the Taxing Master shall allow to the other parties to the suit or matter all such costs as have been incurred by or occasioned to them by reason of the matter so disallowed; and such costs shall be paid by the party by or on whose behalf such state of facts, affidavit, or other proceeding was so brought in.

X.—In all proceedings before the Master, where he is attended by Counsel, the allowances on the taxation of costs in respect of the fees to such Counsel are to be regulated upon the same principle as if the proceedings were before the Court.

XI.—The costs of procuring the attendance of Counsel before the Master are to be allowed on the taxation of costs as between party and party, in all cases in which the Master shall certify such attendance to be proper, and in no other case.

XII.—In case of the absence from illness or otherwise, of any Master to whom any cause or matter is referred, any other Master may, with his concurrence, act in the place of the Master so for the time being absent; but any order or other proceeding to be made or had by or before such Master so acting, is to be entered as made or had by or before him for or in the place of the Master to whom the reference is made.

XIII.—The Masters are forthwith and from time to time to meet and consider such additional Orders or Regulations as may appear to them, or the majority of them, calculated to expedite and facilitate the satisfactory transaction of the business of the suitors in their offices, and to report such additional Orders or Regulations to the Lord Chancellor, to the end that, if the same should be approved by him, proper steps may be taken for such additional Orders or Regulations being adopted and duly made General Rules and Orders of the Court.

XIV.—The Registrars are forthwith and from time to time to meet and consider such Orders or Regulations as may appear to them, or the majority of them, calculated to expedite and facilitate the satisfactory transaction of the business of the suitors in their office, and to report such Orders or Regulations to the Lord Chancellor, to the end that, if the same be approved by him, proper steps may be taken for such Orders or Regulations being adopted and duly made General Rules and Orders of the Court.

XV.—That this Order be drawn up and entered by the Registrar of the said Court.

(Signed)

COTTENHAM, C.

LANGDALE, M.R.

LANCELOT SHADWELL, V.C.E.

J. L. KNIGHT BRUCE, V.C.

JAMES WIGRAM, V.C.

SYNOPSIS OF JOURNAL REPORTS IN EQUITY.

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<i>Law Journal Reports</i>	13. 1844.	14. 1845.	15. 1846.	16. 1847.	17. 1848.	18. 1849.	19. 1850.
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Mylne & Craig. (Lord Chancellor's Court and Rolls)	and by Beav.						
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Younge. (Ex. Eq.)							
Younge & Collyer. (Ex. Eq.)	Published by 5 Vict. c. 5.						
Younge & Collyer. (First Vice Chancellor's Court.)	Continued by Collyer.						



CASES ARGUED AND DETERMINED

IN THE

Courts of Chancery.

COMMENCING WITH

MICHAELMAS TERM, 13 VICTORIÆ.

L.C.
1848. }
Nov. 17, 18. } PIMM v. INSALL.
1849. }
Nov. 20. }

Settlement—Marriage Articles—Infant Heiress-at-Law—Debts of Ancestor.

In March 1837, T. S. H. died intestate as to his real estate, and indebted to an amount far exceeding his personal estate, leaving Mary S. H. his only child and heiress-at-law. In August 1837, Mary S. H. then a minor, married the defendant Insall, and previously to the marriage, articles were executed by which Mary S. H. and Insall covenanted to settle the descended estates for the benefit of herself, her intended husband, and children; and by the articles it was provided that the parties thereto might at any time within six months after Mary S. H. came of age, vary all or any of the limitations agreed to be made, and that in the settlement to be made should be contained a power of revocation and new appointment. Mrs. Insall attained her age in January 1839, and in May 1840 a settlement was executed purporting to be in pursuance of the articles, and containing a power of revocation, and two days afterwards the power was executed in providing for the debts of T. S. H. In September 1840 Mrs. Insall died, and in 1844 a suit was instituted by a child of the marriage impeaching the deeds of May 1840, and in that suit, to which no creditor of T. S. H. was a party, it was

held, that the settlement (except as to the legal estate,) and the subsequent appointment were invalid, and that the property was bound by the trusts of the articles. In a creditors' suit, instituted in 1844, it was held, that the descended estates comprised in the articles, were assets available for the payment of the debts of T. S. H.

The particulars of this case, and the judgment of the Vice Chancellor Wigram, are reported in 17 *Law J. Rep.* (N.S.) Chanc. 374.

The infant defendants appealed from that decision.

The case was heard, before the Lord Chancellor in November 1848.

Mr. Wood and Mr. Malins appeared for the appellants.

The Solicitor General and Mr. De Gex, for the respondent.

Nov. 20, 1849.—THE LORD CHANCELLOR.
—The appellants are the infant children of the late Mrs. Insall, who was the daughter and heiress of Thomas Stanley Hill. This Thomas Stanley Hill died intestate, seised in fee simple of the estates in question, which were subject to divers incumbrances, and he died indebted in simple contract to an amount far exceeding the value of the personal estate, and the simple contract creditors have now against the real estates the same remedies as specialty creditors had formerly. The infant heiress married

whilst an infant, having, together with her intended husband, before the marriage, agreed by articles that the estates so vested in her should be settled to the benefit of the husband and wife and children, with a power in certain events and in a certain manner to vary the trusts so provided for by the settlement. On the 2nd of May 1840, after the wife had attained twenty-one, the estates were conveyed in due form upon the trusts of the articles, reserving a power of revocation, which was attempted to be carried into effect by another deed of the 4th of May 1840. By a decree of the Vice Chancellor of England, of the 27th of July 1844, in a suit in which the present appellant, Mary Insall, the daughter of the marriage, was plaintiff, and William Insall the other appellant, the son of the marriage, was the defendant, the mother having previously died, it was declared that the husband was bound by the articles of the 24th of August 1837, and that the power of revocation reserved in the settlement of the 2nd of May 1840, was contrary to the agreement in the articles, and that such power, and also the appointment made in pursuance thereof, by the deed of the 4th of May 1840, was invalid in equity, and that the appointees under the deed were trustees of the estate in question, subject to all mortgages, charges, and other incumbrances, if any, to which the same were subject or liable previous to the execution of the deed of the 2nd of May 1840, for the uses and trusts of the said articles of the 24th of August 1837.

This decree ascertains and regulates the rights and interests of the appellants, and they cannot be heard to raise any objection in this suit to what was decided by that decree. But the object of this suit is to obtain payment by the simple contract creditors of the late Mrs. Insall's father out of the real estate, which descended to her. The effect of the decree appears to me to reduce the case to the question whether the articles of 1837 affected the claims of these creditors. Authorities were quoted for the purpose of shewing what would have been the effect of such articles if the heir had been twenty-one at that time. It is quite unnecessary to consider that point, for the heir in this case being an infant, her contract could not affect the interests

of others in the estate. And the decree of the Vice Chancellor has decided that the subsequent transactions of 1840 were inoperative, except so far as they affected the legal estate, making the appointees trustees for the purpose of the articles.

If these articles being merely a contract by an infant heir did not affect the claims of the creditors, and the decree has decided that the subsequent transactions had not that effect, what objection could there be to the decree of Vice Chancellor Wigram, which is the usual decree in a creditors' suit? The recent cases of *Spackman v. Timbrell* (1) and *Richardson v. Horton* (2) were referred to for the purpose of proving an alienation by the heir not being the son of a debtor, whose debts exceeded the amount of his personalty, placed his land out of the reach of his creditors, and such alienation it was contended had taken place in the present instance. It appears to me that the decree of 1844 excludes the latter proposition of fact, and therefore makes it unnecessary to consider the proposition of law. The decree, recognizing the operation of the deed of 1840 so far as relates to the legal estate, declares that the appointees are trustees for the uses and trusts of the articles of 1837; declaring in terms that the appointment of the 4th of May 1840 is invalid in equity, and that the power reserved in the deed of the 2nd of May 1840 was contrary to the articles and invalid in equity. It does not profess to correct the deed of the 2nd of May by striking out the power which would have been contrary to the obvious intention of the parties, who, two days after the power was reserved, professed to execute it by the deed of the 4th of May, the whole obviously being one and the same transaction in effect. The decree treated and declared the whole transaction of 1840 to be void in equity, and operative only as it affected the legal estate, referring all the beneficial interests of the parties to the articles of 1837. Upon these articles therefore, the present rights of the parties must depend. This case on the articles is simply that of an agreement by an infant

(1) 8 Sim. 253; a. c. 6 Law J. Rep. (N.S.) Chanc. 147.

(2) 7 Beav. 112; a. c. 13 Law J. Rep. (N.S.) Chanc. 186.

heir on marriage never carried into effect : it is too late to contend that such a contract is binding — *Clough v. Clough* (3), and a note in *Simson v. Jones* (4). How then can such an agreement defeat the claim of creditors existing at the time it was entered into? There is neither sale nor alienation, and notwithstanding the well-founded observations as to the law treating the heir as liable to the debts to the extent of assets descended, and not the land itself is liable, it is certain that this Court gives to the creditors the benefit of their rights by selling the land itself. If therefore before alienation creditors file their bill for that purpose, they obtain the decree now appealed from, and the decree of 1844 has declared that there was no alienation, the land under the decree is still in the hands of the heir. There is nothing, in this view of the case, inconsistent with the decision of the Master of the Rolls in *Richardson v. Horton*, for his Lordship says “by taking proper proceedings, the specialty creditors may obtain payment, out of the descended or devised real estate in the hands of the heir or devisee; but if such proceedings are not taken, the heir or devisee may alienate, and in the hands of the alienee, the land is not liable, though the heir or devisee remains personally liable, to the extent of the value of the land alienated.” This last observation, which is a necessary consequence of the principal point decided, would deserve much consideration if the principle of that decision were now in question. An infant heiress in possession of real estate, subject up to the moment of her marriage to the debts of her ancestor, on that event settles the land, taking probably for herself and her husband a life interest. If by so doing she became formally liable to all such debts, she parts with the property out of which they might be paid: a state of things might arise which none of the parties could intend, and which may make it more than ever necessary to look to the situation of the ancestor’s affairs. I do not by this observation intend to intimate any opinion as to the soundness of the principle on which that and the other cases

are founded, but only to suggest a consideration of one of the consequences which may arise. I observe that the decree of 1844 declares that the appointees are trustees for the uses and trusts of the articles, subject to all such mortgages, charges and other incumbrances, if any, to which the same hereditaments or any part thereof were subject or liable previous to the execution of the deed of May 1840. It is true that the debts in question could not strictly be called charges or incumbrances to which the lands were subject or liable, although this Court might have sold the land to pay them. There seems ground for supposing that the words in the decree were intended to comprehend that, for as to mortgages and regular charges and incumbrances the reservation was useless, and the Vice Chancellor, in his judgment speaking of the provisions of the deed of the 4th of May 1840 for payment of these debts, says that such provisions were not of much moment, as the land was liable to the debts. If that be the meaning of the decree, all those arguments would be excluded. I do not, however, proceed on that ground, but on the main point decided by the decree, that the attempted alienation was of no effect in equity, and that the parties were remitted to their rights under the articles, which could not, in my opinion, affect the claims of the creditors. I therefore affirm the decree, with costs.

WIGRAM, V.C. }
 June 29, 30; } THE ATTORNEY GENERAL
 July 2, 3, 4, 6, 9; } v. MURDOCH.
 Nov. 7.

Church — Dissenters — English Presbyterians — Scotch Kirk — Free Kirk — Chapel or Meeting House — Trusts — Costs.

A chapel or meeting-house in England was vested in trustees, upon trust, for a congregation of Protestant Presbyterian dissenters, proved to be in as strict connexion with the Established Church of Scotland as practicable:—Held, that this was not a trust for dissenters generally, and that no person was eligible to, or entitled to hold, the office of minister of the chapel whose opinions and acts constituted a disqualification for the

(3) 5 Ves. 710.

(4) 2 Russ. & M. 365; s. c. 9 Law J. Rep. Chanc.
 106.

ministry of the Established Church of Scotland; and that the congregation were entitled to a declaration as prayed, that their minister must be a minister of that church, although the foundation deeds contained no declaration to that effect.

It being proved that the officiating minister of the chapel had adhered to the Free Church of Scotland, and become disqualified for the ministry of the Established Church of Scotland, he and those of the trustees, defendants, who concurred and co-operated with him in opposing the relators and plaintiffs, were ordered to pay the costs of the suit, and the adverse defendants to be removed from the office of trustees.

This was a suit by information and bill at the relation of the plaintiffs, four of the trustees of the Low Meeting-house, at Berwick-upon-Tweed, against the Rev. Alexander Murdoch, the officiating minister, and the other surviving trustees of the meeting-house. The information and bill as amended prayed a declaration that the premises comprised in the subsequently mentioned indenture of the 22nd of May 1719, and the chapel called the Low Meeting-house were subject to trusts for the appropriation of the same as a church or place of public religious worship on the model of the Church of Scotland, and in as strict connexion therewith as was practicable; that no minister or other person was qualified for, or competent to exercise the office of minister or pastor of the Low Meeting-house, not being a licentiate and recognized minister of the Church of Scotland, and in full connexion therewith, and such further declaration of the trusts of the property as should seem meet; that the defendant Murdoch might be restrained by injunction from occupying or using the pulpit of the Low Meeting-house, and preaching or teaching in any manner therein, and from officiating as minister or pastor thereof, and, if necessary, might be removed by decree from his office of minister or pastor; that the other defendants might be restrained by injunction from allowing the use of the pulpit to any person, and permitting any person to preach or teach as minister not being a licentiate or recognized minister of the Church of Scotland; and from allowing the premises to be used in any other manner than as a

place of public religious worship on the model of the Church of Scotland, and in as strict connexion therewith as practicable; for all necessary directions for the election and appointment of a minister, being a licentiate and recognized minister of the Church of Scotland, in the place of the defendant Murdoch; and a declaration that three of the defendants (Wilson, Smith, and Thompson, who were stated to have co-operated and concurred with the defendant Murdoch in his alleged dissent from the Established Church of Scotland, and adherence to the Free Church, and to have insisted on his being retained as minister) had been guilty of a breach of trust, and, if necessary, that they and the remaining defendants might be removed; and for the usual reference to the Master for the appointment of new trustees.

It was stated that before and in the year 1719, a congregation or society of Presbyterian Dissenters from the Established Church of England existed in Berwick, who were known by the name of the people or congregation belonging to the Rev. Master John Turner, and who were in their doctrines, government and discipline in as strict connexion with the Established Church of Scotland as was then practicable for any congregation existing out of Scotland. In May 1719 the members of this congregation resolved to purchase a piece of ground in Berwick for the purpose of erecting a chapel or meeting-house, and they raised amongst themselves and others by voluntary contributions in unequal sums the funds necessary for their purpose.

By lease and release of the 21st and 22nd of May 1719, a piece of ground was conveyed to the use of six trustees, in fee, upon trust for the congregation; and upon it a chapel was shortly afterwards erected called the Low Meeting-house, in contradistinction to another chapel in Berwick, which from its more elevated situation was designated as the High Meeting-house.

By lease and release of the 29th and 30th of July 1734, four of the trustees conveyed the premises to two persons, who by lease and release of the 1st and 2nd of August following reconveyed them to the use of three of the same and five other trustees.

By lease of the 9th and 10th of January 1766, George Stow (one of the last-mentioned trustees, and in whom the pre-

mises were then vested by survivorship) declared that the premises had been conveyed by the indentures of August 1734 "upon trust only, and to and for the people or congregation of Protestant Dissenters then known by the name of the People or Congregation belonging to the Rev. Master John Turner, and to and for no other intent or purpose whatsoever;" and he thereby conveyed the same unto fifteen new trustees, as to the burgage or tenement thereon, in trust for the people or congregation then lately belonging to the said John Turner, and whereof John Gardner was the pastor or minister; and as to the said meeting-house and piece of ground, and the buildings thereon, &c., upon trust and confidence that the trustees, their heirs and assigns, should thereafter (so long as the laws and statutes of the realm would admit) permit and suffer the same to be used, occupied and enjoyed as and for a meeting-house or place for the assembly of a particular church or congregation for the worship or service of God, by the society or congregation of Protestant Dissenters, known by the name of the congregation then lately belonging to the said John Turner, and whereof the said John Gardner was then the pastor or minister, and for the use and convenience of all such others as should thereafter come into and join the said society and attend the worship of God in the said place, and should contribute and pay towards the support of the minister for the time being of the said congregation, and towards keeping the said meeting-house and premises in repair.

This deed contained trusts for sale of the premises if at any time there should be no occasion to use the meeting-house for a place of worship as aforesaid, or if the laws of the realm would not permit, tolerate, allow, or indulge the trustees in the performance of the trusts, or such religious worship to be had, performed, administered, or enjoyed in a public way and in a free and undisturbed manner; the proceeds of the sale to be disposed of to such pious and charitable uses and purposes as the members of the congregation and contributors towards the support of the minister thereof for the time being should direct. It also contained powers of appointing new trustees in certain events, who were to be managers of the trust estate, and were to be

"sober and religious persons being Protestant Dissenters of good credit and reputation, and also members of the said meeting-house and contributors towards the support of the minister thereof for the time being," &c. The premises ultimately (by indentures of the 16th and 17th of October 1835) became vested in fifteen new trustees, of whom the relators and defendants (other than Murdoch) were the survivors.

All, or nearly all, the ministers of the Low Meeting-house, who succeeded John Turner, were at the time of their election to their office, and during the continuance therein, licentiates of the Established Church of Scotland, and had been duly ordained by presbyteries in Scotland. The defendant Murdoch was the thirteenth in succession of such licensed ministers, and was ordained to his office by the presbytery of Kelso in 1836.

The elders and trustees of the meeting-house, by resolutions of the 9th of July 1809, and passed on the occasion of appointing a successor to a then late minister (Mr. Brown), determined (amongst other things) that no person should be admitted a candidate for the office, unless he should have been previously educated for and licensed by the Established Church of Scotland. The same resolutions were adopted on similar subsequent occasions. In 1837 the congregation of the Low Meeting-house and those of several other places of worship in England, in the neighbourhood of Berwick, in connexion with the Established Church of Scotland, united themselves into a presbytery by the name of the Berwick Presbytery, according to the practice and upon the principles of the Church of Scotland. In 1835 several other presbyteries in England, in connexion with the Established Church of Scotland, memorialized the General Assembly of the Church of Scotland, and were recommended by the General Assembly to form themselves into a synod, for the purpose of enabling the Assembly to enter into such communication with them as would distinctly mark its recognition of them as a branch of the Established Church of Scotland. A synod was accordingly formed at Manchester, on the 4th of May 1836, by whom it was unanimously resolved to adopt in the fullest and most unqualified manner, the standards of the Church of Scotland, as to

form of worship, doctrine, discipline, and government. This synod was afterwards recognized by the General Assembly, and a deliverance given by the Church of Scotland on the 21st of May 1839. It was named "The Synod of the Presbyterian Church in England, in connexion with the Church of Scotland," and usually held annual meetings of the elders and ministers constituting the several presbyteries. It issued from time to time pastoral letters to the several congregations, wherein it always referred to its connexion with the Church of Scotland, and one of these letters in particular, dated at Newcastle, on the 15th of April 1840, was read by the defendant Murdoch from the pulpit of the Low Meeting-house to his congregation.

In 1843, certain ministers and members of the Church of Scotland dissented from the doctrines and discipline of the church, and ultimately left it. They signed a deed of demission, repudiating their connexion with the Church of Scotland, and relinquishing their pastoral charges. The General Assembly accepted this deed, and declared the subscribers to it to have ceased to be members of the Church of Scotland. The seceders then formed themselves into a distinct and independent body in Scotland, under the title of "The Free Church of Scotland."

Some of the trustees and other members and seat-holders of the Low Meeting-house Congregation indicated a preference of the Free Church, upon the several points of doctrine and discipline in which it dissented from the Established Church of Scotland, and ultimately appropriated and used the Low Meeting-house for religious worship, according to the doctrines and discipline of the Free Church. The plaintiffs having reason to believe that the defendant Murdoch had given in his adherence to the Free Church, wrote to him upon the subject, and received in reply the following letter:—

"Grove House, 8th September, 1843.

"Mr. Thomas Cockburn.

"Dear Sir,—Yesterday I received a document to which your name, with one or two others, is subscribed, stating that a rumour is in circulation that I have seceded from the Established Church of Scotland, and joined the Free Presbyterian Church of Scotland, and calling upon me respect-

fully to state whether there is any foundation for such a report or not. Of this question may be said what has been said generally, that a question may be put in three lines which would require thirty pages to answer it, though without any desire to evade or any fear to answer the question. It proceeds upon a misapprehension of the position of the Scottish Presbyterians in England, relative to the Established Church of Scotland, and in respect to the charge which I hold. Into these particulars, at a proper time and place and out of courtesy, I have no objection to enter; but in the end of a communion week I have more important duties to occupy my time and attention. I may say generally, however, that as I hold no civil status or endowment from the Church of Scotland, nor ever did, I cannot have demitted these. As to having joined the Free Church, it may rather be said to have joined ours, that is to say, holds the standards of the Church of Scotland without any civil benefice. I have made no change in joining any party, but hold now, as I ever did, the principles of the Scottish Church. That church itself maintains that our Synod can have no other than a symbolical connexion with it, that is to say, by its standards. Both parties in Scotland have all along maintained that Presbyterians, like ourselves in England, are in these circumstances, and are a co-ordinate and independent church. To this co-ordinate church I belong, and as yet it has not joined, nor probably will join, itself to either of these parties. In no other relation did or can the Established Church of Scotland ever recognize any Presbyterian church out of Scotland. It is only, however, manly and candid for me to state, that like every other man I claim to myself the right to express as well as to entertain a decided opinion in this matter, which is all that I have done, having neither signed nor (from the circumstances I have stated) been required to sign, either the act of separation from the Establishment in Scotland or the deed of demission, which the seceding ministers all did. I take the liberty to address this to you, and only regret that this inquiry had not been made before certain overt acts on the part of some had taken place, calculated to affect the peace of the congregation and myself. I may add,

that hearsay and anonymous newspaper matters in this, with which I have no concern, I have, as I usually do, passed over in silence.

"I remain, dear Sir, yours faithfully.

"Alex. Murdoch."

The defendant Murdoch having subsequently intimated from the pulpit that a meeting would be held in the chapel for the purpose of electing new trustees instead of the plaintiffs, and of electing deacons (office-bearers totally unknown in the Church of Scotland, and in the Low Meeting-house), the plaintiffs protested by a writing, dated the 5th of December 1844, against his continuing to hold the office of minister of the Low Meeting-house. The solicitor of the plaintiffs afterwards wrote to three adverse defendants (Messrs. Wilson, Thompson and Smith, who had refused to sign either the letter or the notice to Mr. Murdoch), informing them that the majority of the trustees were about to commence the present suit against them. Notwithstanding this letter and the protest, the adverse defendants and Mr. Murdoch proceeded to elect new trustees and office-bearers, called deacons, in addition to "elders," the only office-bearers in a congregation known in the Church of Scotland. They also permitted the pulpit of the Low Meeting-house to be constantly used by ministers of the Free Church, a practice alleged to be inconsistent with the doctrines and discipline of the Church of Scotland, which does not allow any minister to preach, conduct divine service or administer the sacraments in any place of worship belonging to or in connexion with the Church of Scotland, who is not a minister in full communion therewith.

Proceedings were accordingly instituted against the defendant Murdoch before the Presbytery of Dumfries, which terminated in a sentence duly made and pronounced against him on the 5th of August 1845, whereby he was deprived of his status as a minister of the Church of Scotland.

After certain other statements it was charged, *inter alia*, that the connexion of the Presbytery of Berwick with the Established Church of Scotland had been dissolved by a Synod of the Presbyterian Church of England in connexion with the Church of Scotland, held in the Low Meeting-house at Berwick, on the 16th of April

1844, at which the Presbytery of Berwick was represented, and that the connexion was determined by the adoption of certain resolutions, whereby the Synod accepted an overture on independence, presented to it by the Presbytery of Lancashire. The resolutions were in the following terms:—

"It is therefore hereby resolved, decreed, and declared by the aforesaid Presbyterian Church in England in Synod assembled:—First: That this synod having been originally founded and constituted by the voluntary association or union of the several presbyteries that composed it, each presbytery acting in the forming and constituting of such association, union, or synod, by and in virtue of those powers spiritual which Christ Jesus has conferred upon associating church officers for the good and government of his Church, and having for some years existed as a synod without assuming to itself any denominational title or designation, did in the year of our Lord 1839, in the free exercise of its own heaven-derived authority assume to itself the designation or title of "The Synod of the Presbyterian Church in England, in connexion with the Church of Scotland." That at the time when this designation or title was assumed, there existed no synodical connexion whatever between this Church and the Church of Scotland, as by law established, and that no jurisdiction was exercised or ever claimed by the latter Church over the former, and the latter clause of the forecited title or designation of this Church, namely, in "connexion with the Church of Scotland," therefore neither was nor could be intended or understood to indicate a connexion between the two Churches, which involves a right of jurisdiction on the one part, or an acknowledgment of submission on the other: seeing that the Church of Scotland in General Assembly convened, solemnly declared, in the year of our Lord 1834, that being an established church, she neither did possess legally, nor could constitutionally exercise ecclesiastical jurisdiction in England: seeing also that since the forecited title or designation was assumed, this Church has in all matters pertaining to its own economy and the administration thereof, acted in the most entire independence of the Church of Scotland, nor was its right

so to do even so much as called in question, even when certain ministers of this Church, who had received their orders in the Church of Scotland, were deposed from the holy ministry by sentence of Presbyteries of this Church, acting by warrant from this synod; that consequently the forecited clause in the title or designation of this Church was assumed only in order to distinguish this Church from another denomination, viz., Socinians or Unitarians, who, without having right whatsoever to the name, call themselves, and are called by others, 'English Presbyterians,' and also from certain denominations of orthodox Presbyterians resident in England, viz., those united with the Scottish United Secession and Relief Churches; but the forecited clause, viz., "in connexion with the Church of Scotland," having led to various misapprehensions, as if a connexion involving a right of jurisdiction on the one side, and an acknowledgment of submission on the other, did exist between the Church of Scotland, as by law established, and this Church; and various other sufficient reasons having arisen to render it expedient that the present designation of this Church should be altered:—Wherefore, the associated Presbyterians constituting this Church, in synod assembled, acting upon their own authority as set down in the premises, and possessing the same right and power now to alter, as at the first to assume, their present designation, hereby resolve, decree, and declare that the designation and title shall from this time forth be "The Presbyterian Church in England." As also this synod further resolves and declares that being and continuing the same corporate body it has hitherto been, unchanged in doctrine, discipline, government or mode of worship (in respect of all which, each member of this synod solemnly adheres to the same), the Presbyterian Church in England will continue to assert all its lawful claims, and to maintain all its lawful possessions, rights and privileges of what sort soever they be, as the same have been hitherto claimed or possessed by this Church. Secondly: That this Church shall, through the grace of Almighty God, as an independent branch of the Church of Christ, and in virtue of its own inherent power of self-government and jurisdiction, administer its religious ordinances, make its

disciplinary and ritual regulations, and exercise its spiritual jurisdiction, and further maintain inviolate all the rights, powers and privileges wherewith Christ has invested it in all matters according to the premises. Thirdly: That in all acts of intercourse with another branch or other branches of the Church of Christ, or in forming or maintaining a friendly relation or relations with such branch or branches of the Church of Christ, this Church shall assert, provide for, and maintain its own freedom and independence in all matters spiritual, according to the premises."

The resolution accepting the above overture was duly carried by the meeting, the motion in support of it having been seconded by the defendant Murdoch. Other resolutions were also passed, whereby the members of the synod declared that they deeply deplored the conduct of the Established Church of Scotland in the matter at issue between it and the Free Church, and that they cordially recognized the Free Church of Scotland as a sister church.

The General Assembly of the established Church of Scotland, at a meeting held in May 1844, referred the state of the Scottish Church in England to the consideration of a committee, and in pursuance of its recommendation, rescinded an act of the 27th of May 1836, whereby the Assembly had recognized the Presbyterian Church in England. At another meeting, held at Edinburgh on the 2nd of June 1845, the General Assembly passed a further act by which it was declared, first, that the act of Assembly of the 21st of May 1839, providing for the further recognition of, and for correspondence by reciprocal deputations with the Scottish Presbyterian Synod in England, was thereby rescinded and repealed. Secondly: That the said Presbyterian Synod, with the several Presbyteries under its superintendence, and all the members of the said synod, and Presbyteries who had adhered or should adhere to the resolution adopted by the said synod at their meeting held at Berwick-upon-Tweed, on the 16th of April 1844, on an overture from the Presbytery of Lancashire, were no longer members of, or in communication with the established Church of Scotland, and had ceased to be so since the passing of the act of Assembly of the 27th of May 1844.

Thirdly : That as the several members of the said Synod and Presbyteries had, by adhering to the said resolutions, ceased to be ministers or licentiates of the Church of Scotland, as by law established, and repudiated their connexion with the said Church, they were no longer entitled to officiate in any church or chapel in connexion with the Established Church ; and were therefore not to be held as ministers or licentiates of the Church of Scotland, or as capable of acting or officiating in any church or chapel connected with the same, or of receiving a presentation or appointment to any parish, or other charge in connexion therewith, till they should be reponed by the competent ecclesiastical judicatories of the Church.

The fourth resolution related to the several congregations of the Rev. J. Cumming, D.D., the Rev. A. M'Glashair, A.M., and the Rev. M. Fisher, A.M., all of London, and who still adhered to the Established Church of Scotland.

The information and bill were filed on the 21st of March 1846, and amended by order of the 12th of March 1847.

The Solicitor General, Mr. Little and *Mr. Deere Salmon* appeared for the relators and plaintiffs.

Mr. Lewin, for the defendants in the same interest with the relators.

Mr. Rolt, Mr. Malins and *Mr. Selwyn*, for the adverse defendants, Murdoch, Smith and Wilson.

The bill was taken *pro confesso* as against Thompson, another adverse defendant, and who was out of the jurisdiction of the Court.

The nature of the principal arguments is stated in the judgment.

The following were the chief authorities cited:—

6 & 7 Vict. c. 61. (Lord Aberdeen's Act).

The Presbytery of Auchterarder v. the Earl of Kinnoull (the First Auchterarder Case), 6 Cl. & F. 646.

Ferguson v. the Earl of Kinnoull (the Second Auchterarder Case), 9 Cl. & F. 251.

The Attorney General v. Shore (Lady Hewley's Charities), 11 Sim. 592; affirmed (nom. *Shore v. Wilson*), 9 Cl. & F. 355.

NEW SERIES, XIX.—CHANC.

The Attorney General v. Welsh, 4 Hare, 572 (1).

The Attorney General v. Munro, 12 Jurist, 221.

The Attorney General v. Gardner, *Ibid.* 67.

The Archbishop of York v. Stapleton, 2 Atk. 136.

The Attorney General v. Parker, 3 Atk. 576.

The Attorney General v. Pearson, 3 Mer. 353; 7 Sim. 290.

Leslie v. Birnie, 2 Russ. 114.

Craigdallie v. Aikman, 1 Dow, 1; s. c. 2 Bligh, 529.

Milligan v. Mitchell, 1 M. & K. 446; 3 M. & C. 72; s. c. 7 Law J. Rep. (N.S.) Chanc. 37, and (on the question of parties and frame of the suit) 4 Law J. Rep. (N.S.) Chanc. 281.

Broom v. Summers, 11 Sim. 353; s. c. 10 Law J. Rep. (N.S.) Chanc. 71.

The Attorney General v. Drummond, 1 Dru. & War. 353.

Chad v. Tilsed, 2 Brod. & B. 403; s. c. 5 Moore, 185.

Nov. 7.—WIGRAM, V.C. now delivered judgment, which, after stating the prayer of the information and bill, thus proceeded:—After the discussion which has taken place in this Court, and the statement I have given of the relief sought by the present information and bill, it is scarcely necessary to say that the dispute in the present case has arisen out of circumstances analogous to those which gave rise to the cases of *The Attorney General v. Welsh* and *The Attorney General v. Munro*, the latter decided by the Vice Chancellor Knight Bruce, and confirmed on appeal by the Lord Chancellor. In the present case the defendant Murdoch was elected minister or pastor of the Low Meeting-house at Berwick, in the year 1836, and was, as I understand, the thirteenth minister who had held that office since the congregation was first formed, and of which the congregation now using and claiming to be the owners of the Low Meeting-house at Berwick are the successors. Mr. Murdoch was, at the time of his election to be minister, a licentiate of and an or-

(1) Many of the circumstances of this case were the same with those of the present. See Mr. Hare's report.

daind minister of the Established Church of Scotland. The Attorney General and plaintiffs allege that Mr. Murdoch has since adhered to that body, which, in consequence of the decision in *The Auchterarder case*, seceded from the Established Church of Scotland, and constitutes what is now called the Free Church; and the case of the Attorney General and the plaintiffs is, that Mr. Murdoch, having thus adhered to the Free Church party, has become disqualified for, and is incompetent to exercise, the office of minister or pastor of the Low Meeting-house at Berwick. If, at the close of the argument, I had been as fully aware as I now suppose myself to be, of what was actually decided in the case of *The Attorney General v. Munro*, there would have been only one point in the present case upon which, at the utmost, I should have thought it necessary to reserve my judgment; and as that point is the only one upon which, after the best consideration which I have been able to give to the present suit, I think any difficulty can be entertained, I shall endeavour, in the observations I am about to make, to point out how much of this case I consider as virtually decided by *The Attorney General v. Munro*.

In order to do this with the greatest distinctness, I shall begin with supposing that the trusts which the Attorney General and the plaintiffs contend are the trusts of the Low Meeting-house at Berwick, are declared by deed, as was the case in *The Attorney General v. Welsh* and in *The Attorney General v. Munro*; and in considering the case upon that hypothesis, I will assume that Mr. Murdoch has seceded from the Established Church of Scotland, and adhered to the Free Church, and that the Act of the General Assembly of the 2nd of June 1845, applies to Mr. Murdoch. Upon these hypotheses the case of *The Attorney General v. Munro* is a direct authority entitling the plaintiffs to the relief they ask. *The Attorney General v. Welsh* was, I believe, the first of the cases of this class which came before the Court. The second was the present case, upon the notice for an interim injunction in July 1846; but at that time the case of *The Attorney General v. Munro* had not come before the Court,

and in giving my judgment, in the case of *The Attorney General v. Welsh*, and afterwards, in the present case, in July 1846, I abstained from giving an opinion on one point, which is now concluded by *The Attorney General v. Munro*. I did not hesitate to state my opinion that the decision in *The (First) Auchterarder case* was in its nature declaratory, that it introduced no alteration in the Established Church of Scotland, and decided only what was the then position of the Established Church of Scotland. I was pressed with an argument of the defendants, that whatever the case might be as to Scotch churches locally situated in Scotland, and subject to the jurisdiction of the Established Church of Scotland, the question of non-intrusion involved no question of doctrine, discipline or practice, and that it was purely speculative as regards any proprietary church locally situated in England. Upon the value of this argument I gave no opinion, deciding only that upon the evidence then before me, it was impossible I could act upon it; but the decision of *The Attorney General v. Munro* has set that question at rest. The point arose in that case, and was, I think, rightly decided. If, therefore, the trusts of the Low Meeting-house at Berwick are such as the Attorney General and the plaintiffs say they are, and if those trusts were declared by deed, and if Mr. Murdoch has seceded from the Established Church of Scotland and adhered to the Free Church; and if the above-mentioned Act of General Assembly applies to Mr. Murdoch, there can be no doubt as to the conclusion to which I must come. The case is bound by authority. The circumstance that the Low Meeting-house at Berwick is locally situated in England, and is not subject to the jurisdiction of the Established Church of Scotland, makes no difference.

The next point which suggests itself is, whether the absence of a deed, declaring the trusts of the property comprised in the indentures of 1719, makes any difference. It was not argued, nor could it have been argued with success, that there was any rule of law which, in a case circumstanced as this is, makes a deed or even a writing necessary to the case of the Attorney General and the plaintiffs. Their case is this, that they have had cast upon them the

burthen of proving that the trusts of the Low Meeting-house at Berwick were such as they say they were, in order to entitle them to the decree they ask. This is the question which, I stated at the outset, has been the real question of difficulty in the present case; and to the consideration of this question I have accordingly directed my best attention. But it will be most convenient that I should reserve this point for the last, and assume, for argument's sake only, whilst I am observing upon other points of the case, that it is to be answered in favour of the Attorney General and the plaintiffs, at least to this extent, that no person is eligible to, or entitled to hold, the office of minister of the Low Meeting-house at Berwick whose opinions and acts constitute a disqualification for the ministry of the Established Church of Scotland.

I have hitherto assumed that Mr. Murdoch has, by some positive act or acts, both seceded from the Established Church of Scotland and adhered to the Free Church. From the charge of formal secession Mr. Murdoch must, I believe, be at once acquitted, except so far as adherence to the Free Church involves in it a secession from the Established Church. I do not find that Mr. Murdoch has, by signing any deed of demission or other formal act, in terms seceded from the Established Church of Scotland. But is any such express act of secession necessary? The answer to this question must be in the negative. The act of the General Assembly of the 2nd of June 1845, in terms decides that adherence to the resolution of the synod held at Berwick on the 16th of April 1844, was alone sufficient to dissolve the connexion between the adhering members of the Synod of Berwick and the Established Church of Scotland. The act of the Assembly treats the adherence itself as a repudiation of that connexion. The words are, "that as the several members of the said synod and presbyteries have, by adhering to the said resolutions, ceased to be members or licentiates of the Church of Scotland as by law established, and repudiated their connexion with the said Church, they are no longer entitled to officiate in any church or chapel in connexion with the Established Church, and are therefore not to be held as ministers or licentiates thereof," &c. &c.

Upon reference to the resolutions of the synod held at Berwick, mentioned in the act of the Assembly of the 2nd of June 1845, it would be found that there is nothing in them which imports secession from the Church of Scotland on the part of the individual members at the synod, except what is involved in adherence to the Free Church and (I do not know whether the observation is worth making) that before the act of the 2nd of June the connexion which in 1836 was formed between the Established Church of Scotland and the Presbytery of Berwick was dissolved.

The next question then is, whether Mr. Murdoch has so acted as to have brought himself within the scope of the act of the General Assembly of the 2nd of June. If this question be identical with the question whether Mr. Murdoch's avowed opinions are those of the Free Church or of the Established Church of Scotland, there is not, as it appears to me, any room for doubt; but as the evidence appears to me to prove this, and a great deal more, I will not embarrass the case by making Mr. Murdoch's private opinions a matter of separate consideration. If it be necessary to decide the point, I think Mr. Murdoch must be considered as an adherent to the resolutions of the 16th of April 1844, which, by the act of the General Assembly of the 2nd of June, is declared to have, *ipso facto*, dissolved his connexion with the Established Church of Scotland. The fact that he holds the opinions of the Free Church is a step only in the proof of the adherency, and those opinions and the charge of adherency appear to me incontestibly proved by Mr. Murdoch's letter of the 8th of September 1843, in answer to the plaintiffs' letter of the preceding day, by the admissions in his answer, which was read by the plaintiffs as evidence in support of their case, by the part which he took in the proceedings of the 16th of April 1844, by his connexion with the Synod and Presbytery of Berwick, and by the part taken by him in the controversy relating to the Free Church and the Established Church of Scotland. A man adheres to an opinion when he remains firmly fixed in that opinion; he adheres to a resolution when being present at the meeting at which the resolution is come to, he assents to it and gives it the authority of his voice and

sanction. No particular form of doing this can be requisite. The Judge who has to decide the case must, as a jurymen, decide upon the evidence of the case, whether the party charged with adherency is or not proved to have adhered in the sense above explained. In *The Attorney General v. Munro* the Vice Chancellor (Knight Bruce) argued that part of the case in that way. He reviewed the several acts of Mr. Munro for the purpose of seeing whether the charge of adherency made against that gentleman was or not substantiated, and concluded by observing that the whole of the evidence was to the effect that Mr. Munro's opinions and acts had convinced him that Mr. Munro had placed himself in the predicament of adherency stated in the act of the General Assembly of the 2nd of June. The acts of Mr. Munro in that case upon which the opinion of the Court was founded were more numerous than are those upon which I found my opinion in the present case; but that is not the question. In the absence of denial or explanation on the part of Mr. Murdoch, I cannot but regard him as an adherent to the resolutions of the 16th of April, to which the act of the General Assembly refers. I find no such denial or explanation as can take away the effect of the acts referred to, as they bear on Mr. Murdoch's position with respect to the Established Church of Scotland; and as no change in Mr. Murdoch's opinion is suggested, I must consider his opinions as being the same now as they were in April 1844. But in a case like the present in which I am called upon to administer the trusts of a charity, I am not prepared to admit that it is necessary for the plaintiffs to prove the adherency of Mr. Murdoch to the resolutions of the 16th of April, assuming (as I now do) that no person is eligible to or entitled to retain the office of minister of the Low Meeting-house at Berwick whose opinions and acts constitute a disqualification for the office of minister of the Established Church of Scotland. It appears to me that the Attorney General and the plaintiffs have proved enough if they have proved that Mr. Murdoch is under such a disqualification. The act of the Assembly of the 2nd of June was addressed to particular subjects, namely, the acts of particular ministers of the Church of Scotland in adhering to the

resolutions of the 16th of April; but the offence was not one of form. It consisted in the public declaration of particular opinions, which opinions so declared operated in the way pointed out by the act of Assembly. If I find these opinions entertained and openly declared and acted upon by Mr. Murdoch, can I (upon the assumption which I now make) avoid holding that he is disqualified for the office of minister or licentiate of the Established Church of Scotland, and consequently no longer qualified to hold the office of minister of the Low Meeting-house at Berwick, only because the Attorney General and the plaintiffs may not have succeeded in proving his adherency to the resolutions of the 16th of April? The argument must be, that an act of Assembly or some ecclesiastical judicatory is necessary, and that this Court cannot incidentally determine that Mr. Murdoch's opinions and acts disqualify him for the office of minister of the Established Church of Scotland, however plainly and publicly those opinions may be declared. I cannot think that such a conclusion would be right. In this case I consider the evidence as proving beyond dispute that Mr. Murdoch is a member of the Free Church of Scotland. I cannot consider that point as being really at issue in this cause; and if that be so, the consequence must be in this suit the same as if adherency to the resolutions of the 16th of April had been (as in fact I think it really is) proved. I adhere to the opinion I expressed in *Welsh's case*. In the above conclusion my judgment may possibly have erred; but since I have read the judgment in *The Attorney General v. Munro*, I have considered that case as settling every point which is necessary for the decision of the present case. Upon the question of facts, so far as I have hitherto considered them, I think the evidence satisfactory.

I come now to that part of the case upon which the struggle arises, namely, that which relates to the trusts of the Low Meeting-house at Berwick, and upon this part of the case I will not deny the existence of considerable difficulty. Strange as it may seem, the history of Dissent appears to shew that the objection entertained by Dissenters to tests and subscriptions was so strongly felt by all, that it would almost appear to have been a sufficient bond of union between

different denominations and classes of Dissenters against the Established Church, however much the Dissenters may have differed amongst themselves. *Lady Hewley's case* is in point. The bequest in her will was held to be a bequest to Protestant Dissenters, and it was decided, without reference to Lady Hewley's religious opinions, that three distinct classes of Dissenters—namely, Presbyterians, Baptists, and Independents were objects of her bounty. I need not pursue this point further; but however this may be in the case of a general bequest to Protestant Dissenters, I cannot very readily come to the conclusion that a particular congregation building a meeting-house for their own use can have intended the same thing, and considered it a matter of indifference whether the minister they elected was a Presbyterian, Baptist, or Independent. Any of the classes of Dissenters may think it right to permit a minister of a different denomination of Dissenters to fill the pulpit; but it is quite another thing to suppose that an existing congregation would not require some more positive standard of truth than the mere exclusion of tests and subscription.

In this case, however, it was said, that the terms of the foundation deed decided the question, and shewed that the trusts of the Low Meeting-house at Berwick were trusts for Protestant Dissenters generally. To that argument I was opposed at the hearing of the cause, and to the opinion I then formed I still adhere. The deeds, which are said to evidence the trusts, are four in number. The first were dated the 21st and 22nd of May 1719, by which the parcel of land upon which the Low Meeting-house at Berwick was afterwards erected and now stands, was conveyed to trustees for the use of an existing congregation of Protestant Dissenters. The existence of this congregation appears to be carried back as far as the year 1686, and in 1719 John Turner was minister of the congregation. There is nothing in the language of this deed which appears to throw any light upon the subject of the present inquiry. In July or August 1734 it became necessary to appoint new trustees of the Low Meeting-house at Berwick; and by indentures of the 29th and 30th of July 1734 the surviving trustees of the deed of 1719, conveyed the property to

other trustees, who, by indentures of the 1st and 2nd of August 1734, reconveyed to the old and some new trustees, upon trust, for the congregation to whom the Low Meeting-house at Berwick then belonged. In the deed of July 1734, the Low Meeting-house at Berwick is described as a house then used as a meeting-house for a congregation of Protestant Dissenters. The same description is applied to the Low Meeting-house at Berwick in the deed of the 1st and 2nd of August 1734. By indenture of lease and release of the 9th and 10th of January 1766, the Low Meeting-house at Berwick was again conveyed to new trustees. In that deed, which recites the prior deeds of August 1734, Stow, who was a party to those deeds of 1734, declared that the Low Meeting-house at Berwick had been conveyed by the indentures of August 1734, upon trust only, and to and for the people and congregation of Protestant Dissenters then known by the name of the Congregation or People belonging to the Rev. Master John Turner, and to and for no other use, intent, or purpose whatsoever; and by the indentures of 1766 the Low Meeting-house at Berwick was conveyed to new trustees, in trust, for the people or congregation then lately belonging to the said John Turner, and whereof John Gardner (party to the deeds of 1766) was then pastor or minister, and in the trust and confidence that the trustees to whom the Low Meeting-house was thereby conveyed should permit the same to be used, occupied, and enjoyed as and for a meeting-house or place for the assembly of a particular church or congregation for the worship or service of God, by the society or congregation of Protestant Dissenters, known by the name of the Congregation late belonging to the said John Turner, and whereof the said John Gardner was then the pastor or minister, and for the use and convenience of all such others as should thereafter come into and join the said society and attend the worship of God in the said place, and should contribute and pay towards the support of the minister for the time being of the said congregation, and towards keeping the said meeting-house in repair. In this deed was contained a power of appointing new trustees, and the qualification of persons so to be appointed trustees is described as follows :

such sober and religious persons being Protestant Dissenters of good credit and reputation, and also members of the said meeting-house, and contributors towards the support of the pastor thereof for the time being as were most likely to defend, perform, and promote the trusts thereinbefore expressed. New trustees have from time to time been since appointed, but in none of the deeds of later date than 1766 is anything found to alter the argument as it stands upon the deeds I have already noticed.

The argument for Mr. Murdoch, and those who take part with him, was, that the deeds above cited shew that the trusts of the Low Meeting-house at Berwick were trusts for Protestant Dissenters generally; that I must refer the deeds of 1734 and 1766 back to the year 1719, when the land, upon which the Low Meeting-house at Berwick was built, was conveyed to trustees for the use of an existing congregation of Protestant Dissenters, and treat the whole as a foundation deed declaring a trust for a congregation of Protestant Dissenters generally, and not Protestant Dissenters of any particular denomination.

If this argument were well founded—(and for the purposes of the argument, I will suppose all the deeds to be of the same date, viz., 1719)—if this argument were sound, and if these trusts are to be taken as the trusts upon which the property was originally acquired, and to which it was dedicated in 1719, it would follow that Presbyterians, Baptists and Independents were alike included in the trusts of the deeds. I have heard nothing to satisfy me that those trusts have been varied by anything that has since taken place, but I am satisfied the argument is not sound. There is a fallacy in confounding words of gift with words of recital. A gift to Protestant Dissenters would, according to the decision in *Lady Hewley's case*, include Presbyterians, Baptists and Independents; but a gift to an existing congregation of Protestant Dissenters raises a very different question as to the parties for whose benefit it is intended. The simple gift raises the question, what is meant by the words "Protestant Dissenters." The recital raises the question, of what class of persons did the congregation of Master John Turner consist? To those persons the deeds, by the recitals

they contain, shew the property in question to belong; and it would be a violation of every rule of construction and common sense to say that the words of the deeds in question were equivalent to a declaration of trust in favour of Protestant Dissenters of every denomination, if, in fact, as the information and bill allege, the congregation of John Turner was a congregation of Presbyterian Protestant Dissenters, in as strict connexion as was practicable with the Established Church of Scotland. Upon this point of the case I cannot bring myself to think there is reasonable ground for doubt. The question is as to the character of the congregation of Master John Turner. With respect to the clause in the deed of 1766, for the appointment of new trustees, it does not, upon consideration, alter the view I have already taken, although at the time of the argument it appeared to me to weaken in some degree the observations arising upon the other part of the deeds. But this I now think it does not; for the qualification required in the persons to be appointed new trustees, refers back to the anterior parts of the deeds and the trusts thereby declared, which raises the same question as before: what was the character of the congregation of Master John Turner? The requisition is that the trustees shall be not only Protestant Dissenters, but members of the congregation.

Another point much dwelt upon in argument was, the sense to be attached to the expression found in the information and bill, that the Low Meeting-house at Berwick was in connexion with the Established Church of Scotland. In criticizing that expression, I think the Attorney General and plaintiffs are entitled to have the expression read, as if they had invariably used the expression "in as strict a connexion with the Established Church of Scotland as was practicable"; and the meaning of the information and bill in this respect (whether proved or not is another question) appears to me to be free from doubt. Their case is, that the congregation of Master John Turner was a congregation of Presbyterian Dissenters; that the Established Church of Scotland was their model, and that they were in as close connexion with that Church (taking their ministers from it, and submitting to its jurisdiction) as was

compatible with the fact, that the Low Meeting-house at Berwick was locally situated beyond the jurisdiction of the Established Church of Scotland. An illustration of this is found in the proceedings which took place at the constitution of the English Presbytery of Berwick, and in the later proceedings by which the connexion between the Presbytery of Berwick and the Established Church of Scotland was afterwards dissolved. The aptness or the correctness of the expression is not now the question, but the meaning of the words in these pleadings; and upon that I cannot bring myself to doubt, that an actual and complete connexion between the Low Meeting-house at Berwick and the Established Church of Scotland, such as would make the former an integral part of the latter, might not be practicable by reason of the locality of the former, and the limits of the jurisdiction of the latter; but the connexion was to be as complete as this and perhaps some other difficulties would admit of.

The next question then is, what, upon the evidence in the cause, was the character of the congregation of Master John Turner, in 1719? Was it a congregation of Protestant Dissenters, composed indifferently of Presbyterians, Baptists and Independents, or was it a congregation of Presbyterian Dissenters in this sense, that the established Church of Scotland was the model of the Low Meeting-house at Berwick, and that no one was eligible to be minister of the Low Meeting-house at Berwick, whose opinions disqualified him for the office of a minister of the Established Church of Scotland? In giving my answer to this question, I shall (without going into details, which would really be useless) refer briefly to the leading grounds upon which my opinion has been formed. One is, that the all but uniform, if not uniform, practice of the congregation has been to elect ministers who were licentiates of the Established Church of Scotland. The accidental election of a minister not being such licentiate or minister would not, in my opinion, affect the inference to be drawn from an uniform practice, unless it were distinctly proved that, in the excepted case, the person elected was not a Presbyterian, but a dissenter of a different denomination, and I cannot consider that any such proof

has been given in the present cause. A second point, which I cannot but think important, is the practice of the congregation of the Low Meeting-house at Berwick, proved to be almost uniform, of sending for a minister to some Scotch Presbytery when, from the illness of their own ministers, or other accidental circumstances, occasion required they should supply the absence of their own ministers. The third and last point I shall notice is, the direction of the English Presbyteries by the General Assembly of the Established Church of Scotland, at the instance of the former. Combining this with the admitted connexion between the Low Meeting-house and the Presbytery of Berwick, I cannot but conclude that I have in 1837 the unqualified admission of the congregation of the Low Meeting-house at Berwick, and of Mr. Murdoch their minister, that at that time the Low Meeting-house at Berwick sought to establish and did establish as close a connexion with the Established Church of Scotland as was practicable, and that such connexion was maintained by the congregation of the Low Meeting-house at Berwick, until the disputes arose which led to the formation of the Free Church.

Opposed to this were certain resolutions which, on the 9th of July 1809, and again on the 7th of May 1821, were come to by the congregation, or their elders, relating to the election of ministers to the Low Meeting-house, at Berwick. By these resolutions it was declared, that no person could be admitted as a candidate unless he had been educated for and licensed by the Established Church of Scotland. Such resolutions, it was said, were inconsistent with the idea that such a qualification as the resolutions required was recognized by the congregation from the beginning. I cannot admit the force of that argument. It is obvious that it may have been intended for a much more limited purpose than that of introducing for the first time ministers of a totally different denomination from Presbyterians. At all events, I cannot without more explanation than has been offered me, give to these resolutions the sweeping effect which the defendants' arguments require me to do.

Some points of minor importance were pressed upon me; but with the view which

I take of the case of *The Attorney General v. Munro*, in its bearings on the case now before me, it does not appear to me that I can usefully entertain the consideration of any other points than those I have already noticed.

With respect to the trustees, the opinion I have expressed respecting the position of Mr. Murdoch involves in it as a consequence, that the trustees who have taken part with him against the plaintiffs have in fact committed, or supported Mr. Murdoch in committing, a breach of trust. But I have felt bound to consider, especially with a view to the question of costs, whether the case is not one in which Mr. Murdoch and the trustees may not have been justified in saying that they were entitled to have the opinion of the Court upon the case, and that they ought not to be charged with the costs of obtaining that opinion. My conclusion, however, is, that the trustees who have taken part with Mr. Murdoch ought to be removed and new trustees appointed in their stead, and that the costs ought to follow the event of the suit, and be paid by Mr. Murdoch and the trustees who have taken part with him. My conclusion upon this point is founded upon this, that the real question between the parties has been, not whether a minister who, by reason of his opinions was disqualified for being a minister of the Established Church of Scotland, was qualified for being a minister of the Low Meeting-house at Berwick, but whether Mr. Murdoch by adhering to the Free Church, had become disqualified for the ministry of the Established Church of Scotland. In this view of the case, there is nothing to distinguish the present case from *The Attorney General v. Munro*, either upon the question of removing the trustees, or upon the question of costs of the suit.

Upon the declaration to be contained in the decree, I have had great difficulty, for the evidence does not fully satisfy me that the foundation deed of the Low Meeting-house requires that the minister should be a minister of the Established Church of Scotland, provided his opinions upon all matters of doctrine, discipline and practice did not disqualify him from being such minister; but I see no means of securing the due performance of the trusts of the

Low Meeting-house at Berwick, except by requiring that the minister shall be a minister of the Established Church of Scotland. He may be such minister *de facto*, and yet be disqualified for being a minister of the Low Meeting-house at Berwick; but I think the congregation of the Low Meeting-house are entitled, as the only means of securing their rights, to a declaration that the minister of the Low Meeting-house must be a minister of the Established Church of Scotland.

M.R. }
Nov. 6, 7, 12. } LAPRIMAUDAYE v. TEISSIER.

Baron and Feme—Fund in Court—Wife surviving—Her Right to Dividends unreceived.

*A testator bequeathed 10,000*l.* to husband and wife, to be put in their joint names, and that of his executor; the husband and wife to enjoy the interest during their joint lives, or the life of the survivor. The fund was paid into court to the credit of the cause,—“the husband and wife, their stock account.” There were dividends unreceived at the death of the husband :—Held, that they belonged to the wife by survivorship.*

A testator bequeathed to Brook Baines Hurlock and Charlotte his wife, a sum of 10,000*l.* 3*l.* per cent. consolidated or reduced annuities, at the option of his executor, to be put in their joint names and that of his executor, they the said Brook Baines Hurlock and Charlotte his wife to enjoy the interest thereof during their joint lives, or the life of the survivor of them, and after their decease, if any children, to be equally divided amongst them, him or her, if only one; and if they should both die without issue of their marriage, the 10,000*l.* was given over. By the decree made in this cause, on the 4th of July 1811, it was ordered that the defendant Stephen Teissier should transfer into court, to an account to be entitled “Brook Baines Hurlock and Charlotte his wife, their stock account,” the sum of 10,000*l.* 3*l.* per cent. consolidated Bank annuities, and it was ordered that the dividends to accrue due thereon when so transferred should, as and when the same

should from time to time accrue and become due, be paid to Brook Baines Hurlock and Charlotte his wife, during their joint lives, and to the survivor of them, during his or her life, or until the further order of the Court, and after their decease it was ordered that any person or persons interested therein or entitled thereto should be at liberty to apply.

Brook Baines Hurlock departed this life in March 1849, leaving his wife Charlotte and also a daughter him surviving. At that time the sum of 582*l.*, for four half-years' dividends was unreceived, and the Accountant General refused payment to any person without an order of this Court.

The widow by this petition now asked that the arrears of income which had accrued due in her husband's lifetime might be paid to her.

Mr. Lewin, in support of the petition.—A gift made to a woman who was married was a gift to the husband and wife, and when the income of property, in which the wife was interested, was not reduced into possession in the life of the husband it belonged to the wife by survivorship, and not to the representatives of the husband, or his assignee—*Wilkinson v. Charlesworth* (1) and *Marsack v. Lyster* (2). In this case the income accrued in the life of the husband, and was not reduced into possession. The will and the order for paying the money into court created a joint tenancy, and the wife became entitled to the unreceived dividends by survivorship—*Forbes v. Phipps* (3), 1 *Rep. Hus. and Wife*, 175, 217, 263, and the power of the husband to receive the income could not extend beyond his life.

Mr. Miller, for the personal representatives of the husband.—This was not a question of joint tenancy. The income as it became due was an interest vested in the husband; it was his property, and he might have assigned or charged it. A gift made to husband and wife could not be treated as the separate property of the wife only. The cases cited applied to a wife's separate property, and to *choses in action*, which might be reduced into possession. In this case

it must be presumed, that a gift of the dividends was made to the husband by the wife, and that the title of the husband was complete as soon as they became due; he might have received them, but he did not. In *Oglander v. Baston* (4), a sum of money was awarded to the husband, and though he was entitled to it in right of his wife, it was held to pass to his personal representative, and not to his wife by survivorship—*Beresford v. the Archbishop of Armagh* (5), and the dividends were so far the husband's property that no account, even of separate estate, could be taken further back than his death—*Dalbiac v. Dalbiac* (6), and in *Atcheson v. Atcheson* (7), this Court considered that the husband, under a devise similar to the present, had an interest in the income separate from that of the wife.

Mr. Lewin, in reply.

The MASTER OF THE ROLLS.—Assuming that the entry in the Accountant General's books follows the order, the dividends must be carried to the credit of the husband and wife, and the survivor of them; in that case I think the dividends will belong to the wife.

Nov. 12.—*Mr. Miller* said, he had procured the certificate of the Accountant General, which set forth "That there is remaining on the credit of this cause Brook Baines Hurlock and Charlotte his wife, their stock account, 10,000*l.*, and in cash 728*l.* 2*s.* 6*d.*"

The MASTER OF THE ROLLS.—I think the unreceived dividends belong to the wife by survivorship.

M.R.	}	STURGE v. STURGE.
May 29, 30, 31;		
June 1;		
Nov. 5.		

Deed — Fraud — Suppression of Facts, Deed obtained by, set aside — Family Compromise.

A deed obtained from a tenant in tail by

- (4) 1 Vern. 396.
 (5) 13 Sim. 643; s. c. 13 Law J. Rep. (N.S.) Chanc. 235.
 (6) 16 Ves. 116.
 (7) 18 Law J. Rep. (N.S.) Chanc. 230.

(1) 10 Beav. 324; s. c. 16 Law J. Rep. (N.S.) Chanc. 387.

(2) 10 Beav. 324.

(3) 1 Eden, 602.

his brothers, without adequate consideration, and when he was in want of money, and either without legal advice or with legal advice meant to promote the wishes and interest of those with whom he was dealing, was set aside, on the ground that the plaintiff did not know that he was entitled to the whole estate, and because the deed was executed without disclosing to him all the material facts, which were known to his brothers, and because there was reason to suppose that the plaintiff was actually misled.

The facts of the case are sufficiently stated in the judgment.

Mr. Turner and *Mr. Cairns*, for the plaintiff.

Mr. De Gex, for the Earl de Grey, a purchaser of a portion of the estate, who had not completed the purchase in consequence of a notice of the plaintiff's claim.

Mr. Roupell and *Mr. Smythe* appeared for Thomas Buckland.

Mr. Amyot for Joseph Mill, a purchaser of portions of the estate, who had completed his purchases.

Mr. Lloyd and *Mr. Stinton* for Elizabeth Buckland, the devisee of John Seager Buckland, deceased, another purchaser, who, after notice of the plaintiff's claim, completed his purchase. They cited—

Stockley v. Stockley, 1 Ves. & B. 23.

Harvey v. Cooke, 4 Russ. 34; s. c. 6 Law J. Rep. Chanc. 84.

Dunnage v. White, 1 Swanst. 137; s. c. 1 Wils. 67.

Brent v. Brent, 10 Law J. Rep. (N.S.) Chanc. 84.

Mr. Bethell and *Mr. Follett*, for Daniel Sturge and Tobias Walker Sturge, who were also executors of Samuel Sturge, deceased, cited—

Bridgman v. Green, 2 Ves. sen. 627.

Dent v. Bennett, 4 Myl. & Cr. 269; s. c. 7 Sim. 539; 5 Law J. Rep. (N.S.) Chanc. 58.

Gordon v. Gordon, 3 Swanst. 400.

Broderick v. Broderick, 1 P. Wms. 240.

Mr. Turner, in reply.

THE MASTER OF THE ROLLS.—This bill is filed by William Sturge for the purpose

of setting aside a deed, dated the 15th of October 1841, which he says he was induced to execute by misrepresentation and fraud, without any consideration, and whilst he was ignorant of his rights to the property which the deed purported to convey.

The case is as follows :—On the 10th of July 1764, the property in question, called the Chilworth estate, was devised by the will of William Mill, the plaintiff's grandfather, to his daughter Elizabeth Mill, and upon her issue lawfully to be begotten, and to the heirs of such issue for ever; but in case his said daughter should die without issue lawfully begotten, he further devised as in his will stated.

The testator died soon after the date of his will, leaving his daughter Elizabeth surviving him. That this will gave an estate tail to Elizabeth Mill, was not disputed in the argument of this case. In September 1785, Elizabeth Mill being about to marry Toby Walker Sturge, the plaintiff's father, an indenture of settlement, dated the 14th of September 1785, was executed by and between Elizabeth Mill of the first part, Toby Walker Sturge of the second part, and John Player and James Hooper of the third part, and thereby it purported that Elizabeth Mill conveyed the estate in question, which is in the settlement described as the estate devised by William Mill to her, and her issue, and the heirs of such issue for ever, to hold to the trustees on the trusts therein mentioned, which, after the solemnization of the marriage, were for the husband for life, with remainder to the wife for life, with remainder to such uses as she should by deed or will appoint. No fine or recovery was levied or suffered, the marriage took effect, and there was issue surviving at the date of the will of Elizabeth Sturge five sons and one daughter. The sons were William, the plaintiff, the defendants Daniel and Tobias Walker Sturge, Samuel Sturge, who was living in October 1841, but died on the 15th of June 1846, and John Mill Sturge, who died in September 1824, in the lifetime of his mother; and the daughter was Hester Sturge, afterwards the wife of John Sergeant, who died in September 1836, in the lifetime of her father.

Elizabeth Sturge, by her will, dated the

12th of February 1821, after reciting the settlement of the 14th of September 1785, gave and devised unto such of her four younger sons, Samuel, Daniel, Tobias Walker, and John Mill, as should be living at the time of her death, other than and except such of her said sons as by the death of the plaintiff, and all his issue, if he should have any, might become the eldest son and heir for the time being of herself and her husband, their heirs, executors, administrators and assigns, from and immediately after the death of her husband, the several lands comprised in the settlement, together with certain leaseholds, to hold the same unto her said sons as tenants in common, and to their heirs, executors, administrators and assigns, subject to the life estate of her husband, and charged with one full fifth part of the value thereof, to be invested for the benefit of her daughter Hester and her children: and she declared the plaintiff was excluded from any benefit of her said devise, because he was otherwise well provided for. The testatrix died on the 25th of August 1825 without having altered her will, leaving Toby Walker Sturge, her husband, surviving.

It is said, that in the year 1827 Toby Walker Sturge, being entitled in tail to an estate called Sodbury, levied a fine and executed a settlement, whereby that estate was limited to himself for life, with remainder to the plaintiff, his eldest son, in fee; and that in the years 1829 and 1830, the plaintiff borrowed different sums of money to the amount in the whole of 3,500*l.* on the security of his interest in that estate. It is further stated, that in 1833, the plaintiff William Sturge having failed in his business, became so reduced in his circumstances, that he returned to his father's house and lived there in dependence upon, and supported by, him. On the 25th of March 1841 the father died, having first made a will, whereby he gave all his real and personal estate to his sons, Samuel, Daniel and Tobias Walker, except that he gave to the plaintiff a legacy of 50*l.* only, stating as a reason that William was otherwise well provided for, and he appointed Samuel, Daniel, and Tobias Walker Sturge executors of his will.

The father was eighty-five years of age when he died, and the bill alleges that the plaintiff, by reason of his having mortgaged his interest in the Sodbury estate to the amount of its value, had not at the time of his father's death, and had not for some time before any means of support, except such as were and had been allowed him by his father; that he had never interfered in the management of his father's affairs and property, and it is, I think, proved that at the time of, and after, his father's death the plaintiff was in needy circumstances. It appears he applied to his brother for pecuniary assistance, to enable him to stock the farm at Sodbury. The plaintiff was discontented with the disposition made of the property of his father and mother, and after considerable negotiation, of which it is to be regretted the full particulars do not appear, and some correspondence, which I shall have occasion to notice, it seems to have been agreed that the Chilworth estate should be equally divided between the four brothers, and that the plaintiff, who was in want of money, should sell his share to the other three; and on the 15th of October 1841, the parties met at the office of Mr. Roberts, a solicitor, to execute the deed which he had prepared; and accordingly an indenture, dated the 15th of October 1841, and made between the plaintiff of the first part, Samuel Sturge, and the defendants Daniel Sturge and Tobias Walker Sturge of the second part, and John Roberts of the third part, was executed by those parties. The deed recited the will of William Mill and the marriage of Elizabeth Mill with Toby Walker Sturge, and after stating the parties of the first and second parts to be the surviving children of the marriage, and that they had agreed that the estate should be equally divided between them, and that the share of the plaintiff should be purchased by his brothers for 950*l.*, it was witnessed, that in pursuance of the agreement, and in order to defeat all estates tail by virtue of the recited will, and to limit the inheritance in fee simple to the uses therein mentioned, and in consideration of the sum of 950*l.* paid by Samuel, Daniel and Tobias Walker Sturge, as therein mentioned, the plaintiff, in pursuance of the

4 & 5 Vict. c. 21. conveyed the estate to J. Roberts in fee, for the uses, in equal thirds, of Samuel Sturge, and the defendants Daniel and Tobias Walker Sturge, as tenants in common.

This is the deed which the plaintiff seeks to set aside. He says he executed it under a misapprehension of his rights, and in the belief that he was conveying only a fourth part of the estate, and that he was not aware that in consequence of no fine or recovery having been levied or suffered he was entitled to the whole estate. He further alleges, that he executed the deed without having had proper legal advice, that the real facts of the case were not disclosed to him, and that he was at the time under the pressure of pecuniary difficulties. It is to be observed that the only title recited in the deed is the title derived under the will of William Mill, and that the only consideration given to the plaintiff was the alleged value of one-fourth of the estate.

In 1843 Samuel Sturge, Daniel Sturge, and Tobias Walker Sturge sold the estate at Chilworth, portions of which were purchased by the Earl de Grey, Thomas Buckland, Joseph Mill, and John Seager Buckland, but before the purchases were completed, the plaintiff William Sturge gave them notice that he disputed the validity of the deed of the 15th of October 1841, and claimed the estate; but in consequence of some delay in filing this bill, which was caused by the necessity the plaintiff was under of first submitting his case to the Society of Quakers, at their monthly meetings, and subsequently of obtaining permission to institute a suit, and again by the death of Samuel Sturge, John Buckland and Joseph Mill completed their several purchases, as also did John Seager Buckland, who subsequently died having devised his interest to Elizabeth Buckland.

The defendants, not now denying that the plaintiff was entitled to the whole estate under the will of his grandfather, William Mill, insist that he was perfectly aware of the nature of his rights and claims, that he executed the deed with the full knowledge of its contents and effect, and that it was a compromise of family differences fairly made after due consideration,

and with a full understanding of the case; and in particular they say, that on the 2nd of April 1841, and almost immediately after the testator's death, the plaintiff required to see and was shewn a copy, namely, the probate copy, of the will of William Mill, and at that time insisted on his right to the whole estate under that will; and that on the 15th of October 1841, the deed containing an accurate recital of the will of William Mill was read over to him, and that he perfectly understood it. These allegations, if established, would be very material, and it is necessary to examine carefully the evidence in support of them, which I have done. As to the meeting of the 2nd of April 1841, the only disinterested person who was present was the witness Livett, who has been examined on both sides, but whose recollection is unfortunately so imperfect that the important facts cannot be ascertained from his evidence. The documents which were material with reference to all the claims then subsisting, were—first, the will of William Mill; secondly, the settlement made on the marriage of Toby Walker Sturge and Elizabeth Mill; thirdly, the will of Elizabeth Sturge, and fourthly, the will of Toby Walter Sturge, and if any claim was made under the will of William Mill it was of the utmost importance to ascertain whether in contemplation of the marriage of Elizabeth Mill, or on any other occasion, a fine had been levied or a recovery suffered of the devised estate. As to the circumstance with regard to any fine or recovery, it does not appear that any inquiry had at that time been, or was then thought of being made; and as to the documents, after repeatedly considering the evidence of Mr. Livett, I find it impossible to collect from it what were the documents produced or referred to, and in particular whether the probate copy of the will of William Mill was produced, as alleged, by the defendants, and if so whether any question was raised upon its construction and effect, or any claim made under it, and upon the evidence of Mr. Livett, I am of opinion that it is not established that in April 1841 the plaintiff knew that he had any legal claim under the will of his grandfather William Mill, and still less that he then claimed the whole estate under that will.

On the 15th of October 1841, at the meeting when the deed was executed, there were present the parties—the plaintiff, his brothers Daniel and Tobias Walker Sturge, and Mr. Roberts, and the attesting witnesses were Augustus Alexander and Mr. Johnson. Mr. Alexander states that before the deed was executed, the draft was read over aloud by himself slowly and deliberately, and that whilst the same was so read the deed was held by the plaintiff and one of his brothers, who attended to, and followed, the reading of the draft, but beyond that he has no recollection of any explanation having been given to, or required by, the plaintiff of the contents or effect of the deed.

Now I am of opinion that this evidence does not by itself establish the fact that the plaintiff did fully understand the effect of what he was doing. It does not shew that he understood, or had the means of understanding, the effect of the will, which was recited in the deed, that he alone was at that time entitled to the estate tail by the will devised to his mother, or that he was (without any consideration for more than a fourth part of the estate) then conveying, or about to convey, away his exclusive right to the whole.

Mr. Roberts has been examined as a witness for the plaintiff and for the defendants. In his evidence for the defendants he states that shortly after the death of the father (and, as it seems, in April 1841, though I do not distinctly recollect the time), the defendant Daniel Sturge consulted him with respect to a question which, he says, had arisen between the plaintiff and his brothers, the question in dispute being that the plaintiff claimed the whole of the estate at Chilworth, and his brothers disputed that claim, alleging that the estate ought to be equally divided. It appears from this evidence that (whether the plaintiff had made this claim or not) the defendant Daniel Sturge informed Mr. Roberts that he had, and we must understand from this that such a claim might be made, and he asked the opinion of Mr. Roberts upon it, upon which occasion Mr. Roberts cited to Daniel Sturge the cases of *Loddington v. Kime* (1) and *Doe d.*

Cooper v. Collins (2). Mr. Roberts, though he had not at that time any copy of the will of William Mill, yet being verbally informed of its contents, and apparently knowing the effect of the settlement, and of the wills of Mr. and Mrs. Sturge, expressed himself to the effect that it appeared in his opinion doubtful what (having regard to the intention of the testator) would be the legal construction put upon the will, such legal construction being in his opinion that the children of the daughter Elizabeth Sturge should divide the estate between them. This being the opinion he expressed, he says that Daniel Sturge told him that he communicated it to the plaintiff. He then speaks of the occasion of the plaintiff first calling on him with reference to the dispute between him and his brothers, and stating his claim to the whole of the estate, on the ground of the whole of the estate being given to William Mill's daughter and her issue. I regret that Mr. Roberts has not stated the time when the plaintiff first called upon him with reference to the dispute. The impression on my mind is that he refers to October 1841, shortly before the execution of the deed, and he says that he saw the plaintiff and the defendants, at different times, on the subject, but not together, and that, having regard to the intention of the testator (William Mill) or to the intention or understanding of their father and mother, he advised the plaintiff and the defendants that it would be better to compromise the matter by settling among themselves, by reason that litigation was attended by expense. He says that he fully discussed the question in dispute with the plaintiff alone, and then referred to and quoted the cases he had before mentioned; he is not aware that he said anything about conflicting decisions, but he told the plaintiff what he conceived to be the intention of the testator; he, from the first, understood that the defendants wished the estate to be divided equally among them all, which arrangement or proposal was, in his opinion, and having regard to the situation of the family, a fair and proper proposal or arrangement for

(1) 2 Salk. 224.

(2) 4 Term Rep. 294.

the plaintiff to accept, as it appeared the best which the particular circumstances of the case admitted of. He says that he advised the plaintiff to consult some other professional person respecting the construction of the will, and that two or three days afterwards the plaintiff told him that he had consulted other lawyers, and had made up his mind on the subject, and he then gave directions to prepare a deed, conveying all his interest in the estate, which he agreed to divide, to his brothers; the consideration of such deed to be reserved.

It seems from this evidence that the plaintiff had at least some opportunities of taking other advice on the subject; and the deed having been read over, as Mr. Roberts states, which agrees with what is stated by Mr. Alexander, Mr. Roberts takes upon himself to state that the plaintiff fully understood it; but it does not appear that in fact the plaintiff ever did consult any other professional person on the subject; it does not appear even that he had any proper means of taking advice on the construction of his grandfather's will, and it is clear that he had no proper means of taking advice on the proposed deed, for Mr. Roberts states in cross-examination that the plaintiff never to his knowledge or belief obtained from him, or applied for a draft or copy of the deed, and that he never promised or undertook to furnish him with a draft or copy of it. Whatever, therefore, might be the advice of Mr. Roberts as to consulting another professional person, it is clear that Mr. Roberts thought the plaintiff should be contented with such advice as could be taken upon his own knowledge and statement of the case, without reference to written documents. Now, in a case like this, I think it was the duty of the brothers, and of Mr. Roberts, who was their legal adviser, to see that the plaintiff, who was, or (in regard to the doubts of Mr. Roberts) might be entitled to the whole estate, and who was called upon to alienate the whole for the alleged value of a fourth part, to take care that the plaintiff did clearly understand what his right was, and what he was doing. In the circumstances in which they were placed, I think it was the duty of the plaintiff's brothers, and of Mr. Ro-

berts, to see, and be able to shew that the plaintiff did in fact receive and act upon independent advice as to his rights, and that he parted with his rights with perfect knowledge, and on deliberation founded on that knowledge.

On considering the evidence of Mr. Roberts, in many places very ambiguously expressed, I own that I am not satisfied from it that the plaintiff understood, or ever had communicated to him the true state of the case. He may have known the opinion of Roberts, and I collect from the evidence, and the conduct of Roberts, as stated by himself, that in his opinion the wills of Elizabeth and Toby Walker Sturge were not legally operative; that the title to the property was that which was given by William Mill, under which the surviving children of Elizabeth Sturge were entitled in equal shares, that such at least in Roberts's opinion was the intention, but there was some doubt upon the legal construction. I make no remark upon this opinion, for however strange and inconsistent with the documents and with the acts done it may seem, Mr. Roberts may have very innocently fallen into an error, and his mistake might not by itself, and in the absence of other circumstances, have made the deed invalid. He admits, however, that the legal operation of the will was, in his opinion, doubtful, and I do not find that his doubt in this respect (which was communicated to the defendants), was ever communicated to the plaintiff. He says, in substance, that the plaintiff claiming the whole, but his brothers wishing an equal division, he, Mr. Roberts, thought it a fair proposal to comply with that wish, without securing to the plaintiff any compensation for the greater right, to which, if Mr. Roberts's doubts were well founded, he was entitled.

Having considered the effect of the evidence of Mr. Roberts, it is proper to look at the evidence of facts before the date of the letters, written by the defendant Daniel to the plaintiff on the subject of his claims. The statement now made by the defendants is, that the will of William Mill was known to the plaintiff on the 2nd of April, and that the plaintiff thus claimed to be entitled to the whole estate under the will. However this was, the plaintiff

was dissatisfied with his position after his father's death, and his brothers intimated an intention of doing what they could to satisfy him. They at least knew that a question, which Mr. Roberts thought doubtful, arose upon the will of William Mill. It does not appear that Mr. Roberts had any doubt that the estate did not pass by the will of Mrs. Sturge, but he had some doubt whether all the surviving children were not entitled under the will of William Mill. The question, according to the view of Mr. Roberts, as I collect it from his evidence and conduct, was, whether in the absence of a fine or recovery the estate belonged to the plaintiff, as heir in tail, or passed by the limitation in the will to all the children, or rather to the surviving children, of Elizabeth Sturge. We do not know all that passed between Mr. Roberts and the defendant Daniel Sturge, but on the 14th of April the defendant Daniel Sturge wrote to the plaintiff as follows:—

"Since I returned home I have been thinking we may defer coming down, as we talked, as it was chiefly with a view to satisfy thee respecting reading the will, &c. All other business we can do when thee come up to 75" (which I suppose is the number of the house where he lived), "where thee and I can consult together for the best. Now, as to the will and settlement, I thought there could be no objection to my reading it, and therefore went over to Tobias and carefully perused the documents, and as the will does not at all apply to thee, being the sole excepting cause, amply provided for the eldest son for the time being, there is no occasion for me to bring it down so soon as intended, as thee may rest assured nothing in it relating to thee would be kept back. The other documents are a confirmation of the will having full power to dispose of the estates; but as Tobias can leave better than I can now, he will most likely come down early and endeavour to satisfy thee."

Considering what is represented to have been the state of the case, this letter appears to me very extraordinary. It is said that the plaintiff claimed the estate under the will of William Mill, which was well known to him. The letter refers to a will which is said not to relate to the plaintiff

at all, "being the sole excepting cause, amply provided for the eldest son for the time being." This odd expression, imperfect and inaccurate as it is, refers, as I think, to the will of Mrs. Sturge, made in pursuance of the settlement giving full power to dispose of the estate. But no information is given respecting the will of William Mill, upon the construction of which Mr. Roberts was consulted, nor can it be collected from the letter that the plaintiff knew of the will of William Mill, or at any time made any claim under it, or was aware that any question in which he was interested arose upon its construction. What followed immediately upon this letter does not appear, but a search, which was made for a fine levied of the Chilworth estate, was unsuccessful, a fact, which does not seem to have been even communicated to the plaintiff. Whatever the plaintiff's claim was, he was not satisfied by such information as he received, and a claim to stand under the will of his mother, in the place of his sister, Mrs. Sergeant, who died in his father's lifetime, was suggested. This claim is, but without evidence, imputed to the plaintiff by the defendant Daniel Sturge, and in a letter to the plaintiff, dated the 11th of June 1841, Daniel Sturge expresses himself as follows: "I have been thinking the time is approaching when we might confer together respecting this supposed claim, to the exclusion of the Sergeants, on Chilworth. I told them the other day thee did give me to understand that their share would be thine; at all events, we should have to pay them or thee one fourth, and if we can agree amongst ourselves as to the value of one fourth, and have I. Roberts' decided opinion in thy favour, we could, perhaps, have deeds or papers prepared by him, and each of us take our share, and finally settle it by the time of the stocks opening, so as to pay thee by the time thee wanted it." This last expression refers to the plaintiff's want of money, and his wish to obtain from his brothers pecuniary assistance to stock his farm. Again, on the 27th of August, Daniel Sturge writes to the plaintiff as follows: "I received thine this morning, and am not aware of the repeated applications.

Thee will recollect I wrote thee in confidence some two months ago on the subject pretty much, and I continue in the same mind, but if thee think of going into a disputation of the will, and disputing Chilworth, then I have done, and no doubt we shall see it our duty to oppose thy plans, for I really begin to suspect thee are thinking of gaining more than thy fair share. It's useless for me to be applied to for help, as I have disposed of all my available funds, and if thee must have money to pay J. Bell (who was a creditor of the plaintiff,) then I think we might agree to settle the business if thee intend to come in instead of the Sergeants, but I really know of no paper of any use to thee, and thee have already heard I. Roberts' opinion upon it, and the only chance I see is for thee to join, and get I. Roberts to divide the estate by the usual deeds, and then we all pay thee a full share; but thee cannot expect me to press this forward, seeing it upsets the Sergeants' claim; but I see thee are willing to get money, and keep this overhead, I must speak my mind freely, and do say, that we should expend all our shares rather than allow mother's will as regards us to be set aside; but this between me and thee only now. And I do say that I shall consider it my place to make a stand, nevertheless I will forward thy views, if of a reasonable turn. I am sure that paper is of no use to either of us, and I could not find from I. Roberts that it would avail thee. If the point is disputed, some years will elapse in the settlement I am sure, and I am anxious for thee to do the best with the land, but I shall not say anything to Samuel or Tobias on this subject at present." This letter has a postscript in which Daniel says, "Thee will see I feel bound to write thee as above, as one of the executors."

These letters do not appear to me to contain any expressions from which it can reasonably be inferred that the real nature of the case, and the opinion of Mr. Roberts thereon, had been fairly disclosed to the plaintiff. In the letter of the 27th of August the defendant Daniel expresses himself as if he had then for the first time, not discovered, but begun to suspect that

the plaintiff was making claim to more than his fair share of the estate; and instead of giving the plaintiff the information which ought to have been given, expressions are used, which (whether intentionally or not) were in fact calculated to mislead him—to make him in fact believe that his only chance of getting anything was to claim only a share in lieu of the Sergeants; that the only persons interested to oppose the only plausible claim that he had were the Sergeants; and that it was the same thing to his brothers whether he succeeded or not; that they were in fact disinterested, which they clearly were not.

Under all the circumstances, I am of opinion that the deed of October 1841 cannot stand as against the plaintiff. I think that the plaintiff did not know his right to the whole estate, and although a mistake in that respect might not alone have made the deed invalid, yet in the absence of a full and free disclosure to the plaintiff of all the material facts and circumstances which were known to his brothers, and with so much reason to think that the plaintiff was actually misled, I am of opinion that a deed obtained from him without adequate consideration, when he was under pressure for want of money, ignorant of his rights, and either without legal advice, or with advice meant to promote the wishes and the interest of those with whom he was dealing, cannot be sanctioned by the Court; and I therefore think that in strictness, and so far as it can be done with justice to others, the deed must be set aside, and the plaintiff be held entitled to have the estate reconveyed to him, he accounting for the 950*l.* which he received, with interest.

But the estate, or some considerable parts of it, has been sold; and the plaintiff, by his bill, prays that he may be at liberty to elect to take the purchase-moneys in lieu of the parts of the estates which have been sold, and at the hearing I understand that he was willing to take the purchase-money and confirm the purchases. If that be the case, the decree will be to take an account of the purchase-moneys received, and for payment of the balance after deducting the 950*l.*

I am of opinion that the costs of the suit must be paid by the defendants Daniel and Tobias Walker Sturge, and if it cannot be otherwise arranged, the plaintiff must pay the costs of the other defendants, and have them over against the defendants first named.

M.R. }
Nov. 6. } KILMINSTER v. NOEL.

Costs—Petition—Service on Solicitor.

A petition was served upon a solicitor who was concerned in a cause for two defendants; it affected one only, but nothing was said to shew that the service was made in respect of that defendant. At the hearing the solicitor appeared for both:—Held, that the party having no interest in the matter was entitled to her costs.

A solicitor was concerned for Capt. Baghott and Mrs. Baghott, two defendants in a cause. In 1841 an order was made that Capt. Baghott should pay a sum of money to — Benett. The Registrar was now requested to draw up the order; but in consequence of the delay that had taken place he declined to do so, and a petition was presented, asking that the order, which affected Capt. Baghott alone, might be drawn up. This petition was served upon the solicitor of the two defendants, without any intimation to shew that the service was made in respect of one defendant only; accordingly both the defendants appeared.

Mr. Giffard, in support of the petition.

Mr. Jessell, for Mrs. Baghott, said she had no interest in the subject of this petition, but she desired payment of her costs.

Mr. Giffard objected to pay these costs. There was but one solicitor, and he must have known that the petition affected Capt. Baghott only, and that the service was made as upon him alone, and not upon Mrs. Baghott, for whom he ought not to have appeared.

The MASTER OF THE ROLLS.—I cannot refuse these costs. There was nothing
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from which the solicitor could know that service was made in respect of one defendant only.

V.C. }
Nov. 10. } STEVENS v. KEATING.

Costs, Taxation of—Successful Motion—Trial at Law.

The plaintiff filed a bill and obtained an injunction upon motion to restrain the infringement of a patent, but was directed to bring an action to try the validity of the patent. The action was tried and the patent was declared invalid. The bill was then dismissed on motion by the defendant for want of prosecution. The Taxing Master decided that the costs of the original motion were costs in the cause:—Held, that the Master was wrong, and that the plaintiff was entitled to the costs of such motion, as being a successful motion within the rules laid down by Sir J. Leach in 1 Sim. & S. 357.

The plaintiff in this case filed his bill and moved for an injunction to restrain the defendant from making cement of a certain description, according to the method described in the specification of the patent granted to the plaintiff. An order was made by this Court on the 18th of January 1847, granting the injunction, the plaintiff undertaking to bring an action to try the validity of his patent. This order was affirmed on appeal before the Lord Chancellor, and the plaintiff was directed to bring his action. Some delay, however, having taken place on the part of the plaintiff, the defendant moved to dissolve the injunction, and the Lord Chancellor, on the 29th of July 1847, ordered the injunction to be dissolved, but directed the defendant to keep an account (1). The action was subsequently brought by the plaintiff, and the jury found that there had been an infringement of the patent. The question of specification was left for the decision of the Court, who found that the specification was insufficient. The defendant then moved before the Lord Chancellor that so much of the order as

(1) 2 Ph. 333.

directed him to keep an account might be discharged, and that the costs of the application and the previous motions might be ordered to be paid by the plaintiff. The Lord Chancellor on that application (December 14, 1848) directed that so much of the order as directed an account to be kept should be discharged, but made no order as to costs. The defendant then moved to dismiss the bill for want of prosecution, and an order was made accordingly in January 1849, and a reference was made to the Taxing Master to tax the costs. Upon this reference the costs of the motion originally made before this Court were allowed to the defendant, as also the costs of the motion ordering the discharge of the undertaking. A petition was now presented that it might be referred back to the Master to review his report.

Mr. Bethell and *Mr. Follett*, in support of the motion, contended that the Master was wrong in having allowed the defendant the costs of the original motion. That motion was in every respect a successful motion. Numerous affidavits were sworn, many by scientific persons, and after considerable discussion the injunction was granted, and that decision was confirmed by the Lord Chancellor. Under these circumstances, the case came within the canons established by Sir J. Leach, and reported in 1 *Sim. & S.* 357, the first of which was, "That the party making a successful motion is entitled to his costs as costs in the cause, but the party opposing it is not entitled to his costs as costs in the cause."

Mr. Stuart and *Mr. Glasse*, in support of the Master's report, contended that the costs were properly allowed. When a bill was dismissed for want of prosecution, the Court always intended to indemnify the defendant as to all the costs incurred, just as much as if the bill were dismissed upon the merits at the hearing. The plaintiff, although he had succeeded in the interim-order for an injunction, had finally failed in his object.

Mr. Bethell, in reply, said the real question was, whether this case came within the rules laid down by Sir J. Leach, and that point rested upon the question, whether the motion made before this Court was or was not a successful motion. If it was, the

plaintiff was entitled to his costs of such motion. The criterion by which to decide whether the plaintiff had made a successful motion was whether he had obtained any order. If he had, then he was successful, although that order might be charged with certain restrictions or reservations. If he obtained relief, then he was successful. On the motion of the 18th of January 1847 the Court decided every point in the plaintiff's favour, but he was afterwards obliged to go to law in order to obtain a decision as to the validity of his patent, and there he was wrong, but only on a point which this Court was unable to decide. It could not, therefore, be considered that the plaintiff was wrong from the beginning, and it would be most unjust to make him pay the costs of those applications in which he altogether succeeded.

The VICE CHANCELLOR.—I understand that the only question before me is as to the costs of the application for an injunction. When I looked into the particulars of the petition I asked for the orders, and as there was a reference to the order of the 14th of December 1848 I asked for that. When I saw it I thought it an important one, for it is an order expressly asking for the costs of the application, "and that the costs of this application and of the motion might be ordered to be paid" by the plaintiff. What does the Lord Chancellor do? Why he makes an order by which he only orders that so much of the order of the 29th of July as directs the plaintiff to keep an account of the cement manufactured, be discharged. That, therefore, was a clear expression of judgment on the part of the Lord Chancellor that he ought not to give the costs of that application. Now, I am not sitting in judgment upon the decision of the Lord Chancellor when I say I think it quite right, according to Sir J. Leach's rules, that this should have been done, for Sir J. Leach says "that a party making a successful motion is entitled to his costs as costs in the cause." The question is, whether that was a successful motion. The only point was one to be decided by the examination of numerous affidavits on both sides, and that was decided in favour

of the plaintiff. It is true that on a point which could not be decided by this Court it turned out, owing to lapse of time and so on, that the injunction could not be sustained, but that did not make the plaintiff's original application the less successful than at first. The order on the application to dismiss was on the application of the defendant. It appears to me that so far as the Taxing Master has thought fit to overrule the decision of Sir J. Leach, that finding cannot be sustained. I shall, therefore, disallow the costs which have been incurred by the motion of the 18th of January 1847.

L.C. }
Nov. 18, 22. } ONSLOW v. WALLIS.

Trust and Trustee—Devisee in trust of an Equitable Estate—Failure of Trusts—Right to call for the legal Estate.

A testatrix, being seised of an equitable estate in fee, devised it to her executors in trust to sell, and out of the proceeds of such sale and her personal estate, to pay her debts, &c., and the legacies given by her in a certain paper signed by her and marked A. The testatrix died without heirs, and the paper A. could not be found. The trustee of the legal estate insisted upon his right to hold the estate for his own benefit upon payment of the debts. On bill by the executors,—Held, that the rule of law laid down in Burgess v. Wheate (1) did not apply; and that the trustee of the legal estate was bound to convey to the executors, the devisees, without reference to the purposes for which the conveyance was required.

By indentures of lease and release, dated respectively the 28th and 29th of July 1837, the release being made between Andrew L. Sarel of the first part, Louisa Sarel, his wife, of the second part, and John Wallis, deceased, of the third part, certain freehold hereditaments in Leicester were conveyed to the use of John Wallis, deceased, and his heirs, upon trust, to convey the same to such persons as Louisa Sarel, notwithstanding her

coverture, should, by any deed or deeds, direct and appoint: and in default of such direction or appointment, to pay the rents and profits to Louisa Sarel for her separate use; and upon further trust, if the said Andrew L. Sarel should die in the lifetime of the said Louisa Sarel, then to convey the said hereditaments to the use of Louisa Sarel, her heirs and assigns; but if the said Louisa Sarel should die in the lifetime of the said Andrew L. Sarel, then that the said hereditaments should be considered as personal estate and not as real estate; and that J. Wallis should be possessed of the same in trust for the executors or administrators of the said Louisa Sarel, as part of her personal estate. John Wallis, the trustee, died on the 2nd April 1842, intestate as to his trust estates, leaving the defendant, the Rev. John Wallis, his eldest son and heir-at-law. Andrew L. Sarel died in April 1843, leaving Louisa, his wife, him surviving. Louisa Sarel died on the 7th of September 1847, without having made any appointment by deed of the premises in question; and by her will, dated the 30th of June 1847, disposed as follows: "I give and devise all and every the manors, lands and hereditaments, of whatsoever tenure, situate and being in the counties of Cornwall and Wiltshire, of or to which at my death I shall be seised, possessed or entitled, either at law or in equity, unto Sir Henry Onslow, his heirs and assigns for ever. I give certain legacies in a certain memorandum in writing, marked with the letter A, and signed by me, which I direct my trustees and executors hereafter named to pay out of my personal estate. I give, devise and bequeath all other the messuages, land, hereditaments, and real estate, and all the personal estate and effects of or to which I shall at my death be seised, possessed or entitled at law or in equity, unto the said Sir Henry Onslow and David Gray, their heirs, executors and administrators and assigns respectively, upon trust, to convert the same into money, and to stand possessed of the monies arising from the sale thereof, in trust, in the first place, to pay thereout all costs, charges, and expenses incurred in the execution of this my will, and my debts, funeral, and testamentary expenses and legacies, and then in payment of the legacies given by me in a certain

(1) 1 Eden, 177.

memorandum signed by me, and marked with the letter A. I appoint the said Sir H. Onslow and D. Gray executors of this my will."

The paper A. referred to in the said will, as containing a list of legacies, could not be found. The testatrix died without any heir. Applications were then made to John Wallis to convey the estates at Leicester, of which he was seised in trust, to the executors and trustees appointed under the will of Louisa Sarel. The defendant, J. Wallis, refused to convey, alleging that he was entitled to hold the estates in Leicester to his own use, subject only to the charges properly chargeable thereon; and he offered to pay such portion of the charges created by the will of Mrs. Sarel as were properly chargeable on these estates, and he demanded possession of the said estates, and the title deeds relating thereto, to be delivered up to him. Sir H. Onslow and D. Gray, the executors, then filed their bill against the defendant, John Wallis, stating the facts above stated, and praying that the defendant Wallis might be decreed to convey to the plaintiffs, as devisees under the will of Louisa Sarel, upon the trusts of the said will, the freehold premises comprised in the deeds of lease and release of the 28th and 29th of July 1837, and that the defendant might be restrained from taking proceedings at law to recover possession of the premises in question.

The defendant, by his answer, denied that the estates in question were vested in him in trust for the plaintiffs, as devisees under the will of Louisa Sarel, inasmuch as the said will did not contain any absolute disposition of the beneficial interest in the said hereditaments, and only operated as a charge upon the same hereditaments of the debts, costs, expenses, and monies in the said will in that behalf mentioned, and that the said Louisa Sarel died without any heir, and the defendant offered to pay and discharge all sums so charged upon the said hereditaments under the said will; and the defendant submitted that the plaintiffs had no equity to call upon the defendant to execute any conveyance to them of the legal estate in the said hereditaments. The defendant then stated, as to his belief, that there were some debts of the said Louisa Sarel still remaining unsatisfied, which the defendant was

willing and thereby offered to pay so far as they were charged by the said will upon the produce of the said hereditaments.

The cause coming on to be heard before the Vice Chancellor of England, his Honour made a decree directing the defendant to convey the hereditaments in question to the plaintiffs, as devisees under the will of Mrs. Sarel; the costs of the defendant, as between solicitor and client, to be paid out of the testatrix's estate.

The case now came on by way of appeal before the Lord Chancellor.

Mr. Humphry and *Mr. Bird*, in support of the decree.—The deed, under which the defendant claims, conveyed the property to him, in trust to convey the same to the heirs and assigns of Mrs. Sarel: the plaintiffs are her assigns. By her will a single fund is constituted, to arise out of the real and personal estate, and the debts, &c. are to be paid out of that mixed fund proportionably—*Roberts v. Walker* (2), *Boughton v. Boughton* (3). The trustees under the will must sell in order to ascertain the relative values, and the legacy duty payable in respect of the real estate directed to be sold—*The Attorney General v. Holford* (4), *Williams v. the Advocate General of Scotland* (5). If the lost memorandum should come to light, shall the defendant be allowed to keep the estate to the prejudice of the legatees?

[The LORD CHANCELLOR.—Suppose a testator leave an estate in trust for A. B. and A. B. die before the testator, can the trustees call for a conveyance of the legal estate to them? Is not this the same case, supposing the paper A. not to be forthcoming?]

In the present case there are duties to be performed by the plaintiffs, namely, the payment of debts. This is not like the case of *Burgess v. Wheate*, or *Williams v. Lord Lonsdale* (6); for the testatrix has disposed of the property by directing a conveyance to be made to the plaintiffs; and the trustee has no right to ask for what trusts the conveyance is required. The heirs of Mrs.

(2) 1 Russ. & M. 752.

(3) 1 H. L. Cas. 406.

(4) 1 Price, 426.

(5) 10 Cl. & F. 4.

(6) 3 Ves. 752.

Sarel might have a right to pay the debts and take the property in specie; but this is not the equity of the defendant.

Mr. Roll and *Mr. Prior*, for the appellant.—The defendant has possession of the legal estate, and the plaintiffs are asking the assistance of a court of equity to deprive him of that, on the ground of a non-existing trust. The trust is merely for the payment of debts, and it is an ordinary principle of administration, that where an estate is devised in fee, if the purposes of the trust do not require an estate in fee, the trust estate is cut down to the extent necessary. The trust insisted upon only amounts to a charge of debts, and the Crown has no right to insist upon a sale.

Mr. Humphry replied.

Nov. 22.—The LORD CHANCELLOR.—No case similar to this has been cited; and, indeed, none have occurred where property being on trust, the owner of the property gives it to somebody else, whether beneficially or not, is a question the defendant has no right to inquire into. It is not like the case of *Burgess v. Wheate*. The only reason why the trustee, under those circumstances, holds property, is, because there is nobody to take it from him; it does not belong to any person whom the law recognizes as having a right to ask for the execution of the trust. Now, here the original owner undoubtedly had a right, as against the trustee, to direct what he should do with the property; he is a mere naked trustee. The testatrix in this case had a right to do what she pleased with the beneficial interest. She does by her will direct the legal estate to be conveyed, or at least gives the property to the trustees of her will. The question is, whether the defendant, who appears to be the trustee of the legal estate, has any right to inquire for what purpose these parties are to hold the trust; it is a gift in trust, it is true, but it is the appointment of persons who are to stand in the place of the original owner as against the trustee. Then why is the beneficial interest, which is, by the operation of the rule of law in *Burgess v. Wheate*, to enure to the benefit of trustees, to enure to the benefit of this trustee? There is no want of persons authorized to require from the trustee the transfer of the beneficial interest. Suppose

the testatrix had simply directed it should be transferred, appointed new trustees, and directed the existing trustee to convey to those who are trustees under the will. Could the trustee of the legal estate dispute the title of the trustee under the will, because they might or might not have the means of carrying into effect the trusts of the will? The real question is, whether it is regulated by the doctrine in *Burgess v. Wheate*. I think that it is not regulated by the doctrine in *Burgess v. Wheate* at all; because that proceeds on the fact of no person having a right to call for the legal estate; and here there are persons authorized to call for the legal estate.

I do not take exactly the view which the Vice Chancellor seems to have done; because he seems to have considered it to depend on the presumed intention of the testatrix. For that purpose you are to assume that she intended that paper "A." should not be produced, and therefore there would be a failure of her declared intention. Therefore if there is any trustee who is to have the benefit of the doctrine in *Burgess v. Wheate*, the trustee under the will is to have it. It cannot be considered that the testatrix had any such view at all. It must be presumed she intended that the purposes declared by the will should be carried into effect. Those purposes have failed in consequence of that paper A. not being produced; it may be produced hereafter or it may not. My judgment proceeds on the ground that there are persons appointed by the owner of the property, to whom the property is to be conveyed. They are the only parties having a right to it; whether or not they have power afterwards to dispose of all beneficial interest, is a matter with which the defendant Wallis, as mere owner of the legal estate, has nothing whatever to do. This seems to me to be a case which does not fall within the doctrine of *Burgess v. Wheate*, so far as the defendant Wallis is concerned; and, therefore, the direction of the Vice Chancellor for a conveyance under the terms of the will is, I think, a proper decree, and it must be affirmed, with costs.

L.C. }
 Nov. 21, 24. } SKARFF v. SOULBY.

Voluntary Settlement—Fraud.

Proof of a debt existing at the date of a voluntary settlement and unsatisfied at the settlor's death, is not per se sufficient to invalidate the settlement; but it must appear that the settlor's property, not included in the settlement, was inadequate to meet his then existing debts and liabilities.

In a suit by a creditor of the settlor, to impeach a voluntary settlement, inquiries were directed as to what debts were owing by the settlor at the time of the execution of the settlement and at his death; and what, at the time of such execution, was the amount of the settlor's property not included in the settlement.

By an indenture of assignment, dated the 7th of December 1842, and made between John Miller of the one part and Eliza Quitton of the other part; after reciting that the said John Miller and Eliza Quitton had for several years cohabited together, and that Eliza Quitton had borne four children during such cohabitation, and that John Miller had determined to discontinue such cohabitation, it was witnessed that in consideration of the connexion which had theretofore existed between the said John Miller and Eliza Quitton, John Miller covenanted to pay Eliza Quitton an annuity of 250*l.* during their joint lives; and for the consideration aforesaid, J. Miller assigned to Eliza Quitton, her executors and administrators, two policies of insurance effected by him in 1832 and 1841 respectively, for two sums amounting together to 5,250*l.*, and all the monies to be received thereunder, upon the trusts thereafter declared, and J. Miller covenanted to pay the premiums on the said policies; and it was then declared that the monies to be received under such policies should be invested in the names of such persons as J. Miller should nominate, upon trust to pay the dividends to Eliza Quitton for life, for the support of herself and her four children, with remainder to the four children.

John Miller, the testator in the cause, died in 1846, and in the same year a creditors' bill was filed against his executors

for the administration of his estate; and the executors by their answer admitted that the testator's assets were insufficient for the payment of his debts. The plaintiffs in the creditors' suit then filed a bill in the nature of a supplemental bill against the executors, and Eliza Quitton and her four children, stating that the testator at the time of his death was indebted to the plaintiff Skarff in the sum of 200*l.*, and to the other plaintiff in the sum of 30*l.*; and after setting forth the deed of assignment of the 7th of December 1842, it further stated that the plaintiffs had only recently discovered the circumstances relating to the assignment of the policies; that at the time of the execution of that deed the testator was insolvent, and in embarrassed circumstances, and indebted to divers persons in considerable sums of money; and that the assignment was without good or valuable consideration, and that the testator never parted with the possession of the policy, or gave any notice to the insurance office of the assignment. The bill then charged that the assignment was fraudulent and void, as against the plaintiffs and the other unsatisfied creditors of the testator, and that the monies received thereunder were assets for the payment of the testator's debts.

The bill then prayed that the assignment might be declared void, as against the plaintiffs and the other unsatisfied creditors of the testator.

The evidence in support of the debt of the plaintiff Skarff was a document in the handwriting of the testator as follows: "I.O.U., Thomas Skarff, 200*l.*, 3rd April 1841;" and the deposition of a witness who stated, that the testator had told him about that date that he had induced Skarff, who was his clerk, to invest his savings in his the testator's hands. The debt of the other plaintiff was for goods supplied to the testator after the assignment of the policies, and amounted to the sum of 30*l.*

Several witnesses on the part of the defendants deposed that the testator at the time of the execution of the assignment was in possession of a flourishing business, and was reputed to be a man of property.

The Vice Chancellor of England, under the circumstances, held that the assignment was void as against the creditors of the testator, and was assets for the payment of

his debts generally; and he ordered the money to be brought into court (1).

The cause now came on, upon appeal, before the Lord Chancellor.

Mr. Stuart, Mr. J. Parker, and Mr. Younge, for the plaintiffs.

Mr. Bethell and Mr. Southgate, for the appellants, Eliza Quilton and her children.—In order to enable the Court to pronounce a voluntary deed to be fraudulent and void under the statute, it must be shewn that the party, by the execution of the deed, has put it out of his power to do that which he was bound to do, namely, to pay his debts; it must be shewn that the author of the settlement was at the time in a state of embarrassment, though not to the point of insolvency; that he was largely indebted beyond his present available means of payment; that he was necessitous, so that the execution of the settlement could not be consistent with the ordinary obligations of common honesty; and that thereby the creditor was hindered and delayed of his just rights—*Kidney v. Coussmaker* (2), *Lush v. Wilkinson* (3), *Richardson v. Smallwood* (4), *Townsend v. Westacott* (5), *Stephens v. Olive* (6). If a single debt, due at the time of execution, were sufficient, without reference to the settlor's property, then no person could make a voluntary settlement which should be valid. Lord Hardwicke's expression, in *Lord Townshend v. Windham* (7), of a man "being indebted" must be understood in the common sense of the term, as "being involved in debt," and not in the strict literal meaning. Here, though the bill alleges that the settlor was indebted to divers persons at the date of the deed, yet the allegation as to the plaintiff's debt is simply that the settlor was indebted to him at the time of his decease. There is no proof of Skarff's alleged debt, and the debt of his co-plaintiff was contracted after the date of the settlement; the bill, therefore, must be dismissed.

Mr. Stuart, in reply, insisted that it was only necessary to shew that the settlor was

indebted to the plaintiff at the date of the settlement, and that the debt was unsatisfied at the time of his death—*Townshend v. Windham*; and that if the Court should be of opinion that the debt was not satisfactorily proved, the Court would direct a reference to the Master as to that point.

Mr. Bacon and Mr. Hall appeared for the executors of the testator and the trustees of the fund.

Nov. 24.—The LORD CHANCELLOR.—The bill in this case alleges the death of the testator in May 1846, that debts were due to the plaintiff at his death, and it then states a settlement of December 1842, and alleges "that the settlor at that time was insolvent, or in embarrassed circumstances, or indebted to divers persons in considerable sums of money." There is no allegation that the plaintiff's debt was due at the time of the settlement, and there is no evidence of the testator being indebted at the time except the document produced, called an I.O.U. The decree declared the settlement void against the creditors, and that the fund, the subject-matter thereof, was assets; and the Vice Chancellor stated, as the ground of his decision, that the allegation "that the settlor was insolvent or embarrassed at the time" was superfluous, and that it was enough to prove that he was indebted at the time. The word "indebted," as used by Lord Hardwicke in *Lord Townshend v. Windham*, in *Russel v. Hammond* (8), and in *Walker v. Burrows* (9), must be considered as meaning that the testator owed some debts. It appears clear in the last case that Lord Hardwicke referred to the language of the statute of 13 Eliz. c. 5, and said the settlement must be "to the end, purpose, or intent to delay, hinder or defraud creditors," and all those cases have treated the simple fact of a debt proved as by no means sufficient to bring the case within the provisions of the statute. Accordingly, Lord Kenyon, in *Stephens v. Olive*, held that a debt secured by mortgage, though due at the time of the settlement, did not invalidate it; that the

(1) 18 Law J. Rep. (N.S.) Chanc. 8.

(2) 12 Ves. 156.

(3) 5 Ves. 384.

(4) Jac. 552.

(5) 2 Beav. 343; s. c. 9 Law J. Rep. (N.S.) Chanc. 241.

(6) 2 Bro. C.C. 91.

(7) 2 Ves. sen. 10.

(8) 1 Atk. 13.

(9) Ibid. 93.

mere fact of a debt being due was insufficient to invalidate the settlement, and it was quite immaterial whether it was secured by a mortgage or not. Property, therefore, on the same principle, at the time of a settlement not included in it, and ample for the payment of the debts, would negative the fraudulent intent. In *Lush v. Wilkinson*, Lord Alvanley said insolvency was necessary; but in *Richardson v. Smallwood* Sir Thomas Plumer held it was not necessary to prove insolvency if the settlor were largely indebted, the question being the intention to defraud creditors; and in *Townsend v. Westacott* Lord Langdale puts the question upon its true principle, as Sir Thomas Plumer had indeed done in *Richardson v. Smallwood*, holding that it was not necessary to shew insolvency, but that the mere existence of debt at the time of the settlement was not sufficient. In this case there is no proof of debt at the date of the settlement, viz. the 7th of December 1842, unless the I. O. U. for 200*l.* dated the 3rd of April 1841, now produced by one of the plaintiffs, be considered as establishing that fact: if it be, it will only prove that 200*l.* was then due, and not the state of the settlor's affairs at that time. This document is not stated in the bill; nor is there any allegation of the plaintiff's debts (to which this document was supposed to relate) at the date of the settlement, and the defendants could not possibly be prepared with any proof affecting that document; it is therefore impossible to support the decree upon any such evidence, and the only doubt I have had, is whether I ought to dismiss the bill, or to direct inquiries.

In *Lush v. Wilkinson*, there being no conclusive evidence, Lord Alvanley dismissed the bill, at the same time giving leave to the plaintiff to file another. In *Kidney v. Coussmaker*, Sir William Grant directed inquiries (there being no evidence), because the plaintiff had not had the proper opportunity of impeaching the settlement. In *Richardson v. Smallwood* Sir Thomas Plumer adopted the same course, as the plaintiff had attempted to prove the debt: and in *Townsend v. Westacott*, Lord Langdale directed in-

quiries; the evidence of the debt being, in that case, only admissions of the settlor, which was not evidence against those who claimed under the settlement. If I were to dismiss this bill, any other creditor might raise the question in another suit, so that the effect would only be unnecessary expense and delay; and the I.O.U., though under the circumstances not affording proof upon which any judgment ought to be founded, may, if it were necessary, well lay the foundation for inquiry. I propose, therefore, to refer it to the Master to whom the administration suit has been referred, to inquire what debts were owing by the settlor at the time of the execution of the settlement and at his death, and what at the time of the settlement was the amount of the settlor's property not included in the settlement.

I have gone through these cases not from any doubt I entertained on the question, but because an accidental expression falling from so great an authority as Lord Hardwicke is made use of to found a theory which is totally insupportable; and, indeed, such an expression would lead to the most absurd conclusion, namely, that to prove the mere fact that a debt existed at the date of the settlement was enough to invalidate it. That could not be the meaning of Lord Hardwicke, as has been supposed; nor could it possibly be the construction to be given to it; but that it was a fraud for the settlor to make a voluntary settlement without regard to the means that would be left to him to pay his debts. It is no new rule, no new observation; and the matter was set right (Lord Alvanley having carried it rather too far) by Sir Thomas Plumer, and, also by the present Master of the Rolls, and upon the well-known rule of the Court, that the mere fact of a debt existing at the time of the settlement is not enough *per se* to invalidate a settlement. For the reasons I have stated there is nothing in this case which would enable me to proceed upon the ground of the settlement being void; but I think there is sufficient to entitle the parties to an inquiry.

L.C. }
 1849. } CHRIST'S HOSPITAL v.
 Nov. 14. } GRAINGER.

Charity — Trustee — Limitation over in default to other Charitable Purposes — Perpetuities — Statute of Limitations.

Testator, by his will, dated in 1624, gave certain funds to the corporation of R, upon trust, for the poor of the town of R, with a proviso that in case of neglect to perform the trusts or of misemployment of the funds, the same should be paid or transferred to the corporation of L, for the benefit of Christ's Hospital. In 1639, on an information by the Attorney General against the corporations of R. and L, a decree was made for the application of the funds, varying the trusts declared by the will, with a declaration that if the corporation of R. should misapply the funds contrary to the decree, the same should be made over to the corporation of L. for the benefit of Christ's Hospital. The corporation of R. misemployed the funds for a series of years; on bill by the corporation of L. against the corporation of R. and the Attorney General for a transfer of the fund, held, affirming the decree below, that the limitation over took effect.

Held, also, that such a limitation over is not within the rules of law against perpetuities, being a substitution merely of one charity trust for another.

Held, also, that as the property had continued in possession of the corporation of R, who, after the acts of forfeiture, became trustees for Christ's Hospital, there was no adverse possession, and the Statute of Limitations did not apply.

Semble—a party who, on the original hearing, does not oppose the decree, will not generally be allowed to re-open the discussion by an appeal or rehearing.

John Kendricke, by his will, dated in 1624, gave 7,500*l.* to the mayor and burgesses of the town of Reading, in trust, to buy lands of the value of 50*l.* by the year, which same he directed to be paid to his sister during her life, and after her decease to the overseers of the poor of Reading for the time being yearly for ever, to be distributed by them, among the poor people of

the town of Reading for ever, according to the discretion of the overseers; and that if his gift and provision should happen to be by the said mayor or burgesses, or by the overseers for the time being, disposed of contrary to his (the testator's) meaning, or if his will touching the same should be neglected or left unperformed by the space of one whole year after it was, by that his will, appointed to be distributed as aforesaid, then his will was, that the said sum of 50*l.* a year should be by the said mayor or burgesses paid to the treasurer of Christ's Hospital in London, to be by the governors thereof employed for the purposes of the said hospital; or else that the said mayor and burgesses for the time being should convey the lands of the said yearly value of 50*l.* unto the mayor, commonalty and citizens of the city of London, and their successors for ever, to be employed as aforesaid. Moreover, that the said mayor and burgesses, with other part of the 7,500*l.* should purchase a house and garden within the town of Reading, for the employing and handling of the stock of money by him thereby left and devised for that purpose; and that the residue of the 7,500*l.* should be a common stock, to be employed and bestowed in the trade of clothing, in the working of wool, hemp, flax, iron, grinding Brazil wood and other stuffs for dyeing, or otherwise, as to the mayor and burgesses aforesaid should seem convenient, for the employment of poor people, and for the preservation and increase of the said common stock; the testator's desire being that they should prefer the poor of the said town to the said works and employment before others of other places. But if it should happen that the said mayor and burgesses, or their successors, should neglect, omit or fail to perform the premises according to his will above declared, or should misemploy the said stock contrary to the intent of his devise for the good of the poor and their honest employment and maintenance as aforesaid, and that such their neglect, omission or misemployment should continue at any time by the space of one whole year together, then his will was that the whole of the said legacy of 7,500*l.* should be void and of none effect, as to, for and concerning the uses thereof before limited, and the said whole common stock should

be by the said mayor and burgesses for the time being forthwith paid to the mayor, commonalty and citizens of the city of London, to the use of Christ's Hospital in London, according as he had above disposed, touching the yearly revenue of 50*l.* bequeathed for the use of the poor people of Reading; as also his will was that in case of non-performance by the said mayor and burgesses, the house and garden to be purchased in Reading aforesaid should be by the said mayor and burgesses and their successors, conveyed and made over to the said mayor, commonalty and citizens of the city of London, and their successors for ever, to the like use of Christ's Hospital in London aforesaid.

The testator died shortly after the date of his will, and the legacy of 7,500*l.* was paid by his executors to the corporation of Reading, who, in compliance with the directions contained in the will, purchased, with part of it, lands, of the value of 50*l.* a year, and also a house and garden, and employed the residue in making loans to the clothiers in the town. In 1634 the Lords of the Privy Council, considering the charity was ill administered, made a certificate as to the mode in which the charity funds should be applied, which varied in some respects from the directions given in the will. In or about the year 1639 an information was filed in the Court of Exchequer against the corporations of London and Reading for the administration of the charity funds according to the certificate. By the decree made in that information, it was ordered, in the terms of the certificate, that the remainder of the 7,500*l.* should be laid out in the purchase of land; and that, after providing a fund for the defence of the title and the repairs of the property, the remainder of the rents and profits should be employed in making loans to poor beginners and clothiers in Reading, until the funds had reached a certain amount, and that then the surplus should constitute a bank or stock in the town of Reading, and the yearly proceeds thereof should go to the binding of poor children apprentices, and the marriage of poor maids, setting the poor and fatherless children to work in the house; and it was lastly decreed that if the corporation of Reading, or their successors, should neglect to perform the premises according to the

decree, or should misemploy the said stock, contrary to the decree, and that such neglect or misemployment should continue at any time for one whole year, then the whole legacy of 7,500*l.* should be void as to the said corporation and as to the uses before expressed, and that the said whole common stock should be, by the said corporation for the time being, forthwith paid to the corporation of London, to the use of Christ's Hospital, as directed by the will; and that the lands and the house and garden should be conveyed by the corporation of Reading to the corporation of London, for ever, to the like use of Christ's Hospital.

The corporation of Reading, in obedience to the decree, laid out, from time to time, portions of the residue of the 7,500*l.* in their hands in the purchase of lands, and invested other portions, and also accumulations of the income of the charity property in the 3 per cent. annuities; and the trustees who had been appointed under the Municipal Corporations Reform Act (5 & 6 Will. 4. c. 76, s. 71), had since their appointment also invested the income of the charity property in the same stock, such investments amounting together to the sum of 7,999*l.* like stock.

In November 1842 the present bill was filed by the corporation of London, as governors of Christ's Hospital, against the charity trustees appointed under the Municipal Corporations Reform Act, the town clerk of Reading, the corporation of the same town (as the parties having the legal estate in the charity lands), and the Attorney General. The bill alleged that the corporation of London, as well as the charity trustees, had, from time to time, during the period of much more than a year together, misemployed the trust property, and had disposed of the same, and the income thereof, contrary to the direction of the will, and also of the decree; and it charged that, under the circumstances aforesaid, the limitations over, contained in the will, had taken effect, and that the plaintiffs were entitled, under the provisions of the will and the decree, to have a conveyance and transfer made to them of the trust property and funds, for the benefit of Christ's Hospital. The bill then prayed a declaration to that effect, and that the corporation of Reading and the trustees might be decreed to convey

and transfer the said trust estates and funds to the plaintiffs accordingly.

The trustees, by their answer, submitted that no act or default of the trustees, or of the corporation of Reading, ought to prejudice the rights of the poor inhabitants of Reading, who were the primary objects of the testator's bounty; and they insisted that the plaintiffs ought to have specified some definite period of time within which, and the names of the persons by whom, such acts and defaults had been made or committed, and they relied upon the great lapse of time since the foundation of the charity, during which the charity had been administered in the way mentioned, and they claimed the benefit of the Statute of Limitations as a defence to the suit.

The cause coming on to be heard before the Vice Chancellor of England, his Honour made a decree in conformity with the prayer of the bill.

It appeared that after the present bill was filed, an information was also filed by the Attorney General against the two corporations for the administration of the charity funds; but the decree, which was now appealed from, was made in the present suit only. The Attorney General then presented a petition of appeal from that decree.

On the rehearing of the cause before the Lord Chancellor, it was contended, in support of the decree below, that by the misemployment of the charity funds for a long series of years, the limitation over in favour of Christ's Hospital had come into operation; that Christ's Hospital was as much an object of the testator's bounty as the poor of Reading, and that the Court, by decreeing that the limitation over took effect, would not disappoint the testator's intention, but would merely transfer the benefit to another class of *cestuis que trust* pointed out by the will and the decree; that there being an express trust over, the doctrine of cy-pres could have no application, even if the performance of the trust had become impossible; and that the Statute of Limitations did not apply to a case where the property was still in the hands of the trustees.

The following cases were cited:—

The Commissioners of Charitable Donations v. Wybrants, 2 Jon. & Lat. 182.

The Attorney General v. the Brewers Company, 1 Mer. 495.

Ward v. Arch, 12 Sim. 472.

Wych v. the East India Company, 3 P. Wms. 309.

The Attorney General v. the Cordwainers Company, 3 Myl. & K. 534.

Jack v. Burnett, 12 Cl. & F. 812.

Pentland v. Stokes, 2 Ball & B. 68.

In support of the appeal it was contended, that the default of the trustees could not in equity be held to prejudice the rights of the *cestuis que trust*; that a condition in derogation of an estate in fee was repugnant and void (1)—*The Attorney General v. Bowyer* (2), *Mills v. Farmer* (3), *Brown v. Higgs* (4). The gift over infringed also the law against perpetuities; for in the event of default, the corporation of Reading was not directed to hold the property for the benefit of Christ's Hospital, but to convey and transfer the same; therefore this was a conditional limitation over to take effect beyond the time prescribed—*The Pewterers Company v. Christ's Hospital* (5). The gift over was in effect nothing but a declaration *in terrorem*. The decree of 1639 bound Christ's Hospital, as they thereby submitted to the cy-pres administration of the charity; and that part of the decree which directed a conveyance over was clearly an excess of jurisdiction—*In re Upton Warren* (6), *The Attorney General v. Merchant Venturers Company* (7), *Hamilton v. Houghton* (8). As Christ's Hospital had neglected to take advantage of the forfeiture for so great a lapse of time, the claim was barred, and the trusts of the charity must be executed cy-pres for the benefit of the town of Reading.

The Solicitor General, Mr. Twiss and *Mr. Blunt*, for the Attorney General.

Mr. Stuart, Mr. James Parker and *Mr. Freeling*, for the plaintiffs.

Nov. 14.—The LORD CHANCELLOR.—
This was an appeal by the Attorney

(1) Co. Lit. 206 b.

(2) 3 Ves. 714.

(3) 19 Ves. 483.

(4) 8 Ibid. 561

(5) 1 Vern. 161.

(6) 1 Myl. & K. 410.

(7) 5 Beav. 338; s.c. 17 Law J. Rep. (n.s.) Chanc. 137.

(8) 2 Bligh, 169.

General, who is a defendant in the cause, and the first question to be considered is the position which the Attorney General has assumed upon this rehearing. The corporation of London, as governors of Christ's Hospital, by the will claimed certain property which had been left by the testator, John Kendricke, in 1624, to the corporation of Reading, for certain charitable purposes in that town, with a direction that if the donees should for one year neglect, omit, or fail to perform the directions of his will, such gift should be utterly void, and should forthwith be paid and transferred to the corporation of London for the benefit of Christ's Hospital. The strict execution of the directions of the will having been found inconvenient, an information was filed by the Attorney General in the Court of Exchequer against the corporations of London and Reading, which led to a decree in 1639, varying the purposes and application of the charity, but still confining it to Reading, and providing, as in the will, that if the corporation of Reading should neglect to perform the directions of that decree, or should misemploy the trust property, and such neglect or misemployment should continue for one year, the legacy should be void and of no effect as to Reading, and that the property should be forthwith paid and transferred to the corporation of London, for the benefit of Christ's Hospital. That the directions of the decree, as well as those in the will, have been neglected and unperformed for a period of far more than one year, is a fact clearly established, and not in dispute on this rehearing. Upon this fact the corporation of London, by their bill, sought to recover the property for the benefit of Christ's Hospital, and this the decree of the Vice Chancellor directed. The Attorney General was properly a party to this suit, but, as it appears, he took no part in the discussion. To this there could be no objection, there being before the Court parties, the trustees for the town of Reading, interested in resisting the claim of the plaintiffs; but that course could be only unobjectionable on the ground of the Attorney General having considered that he might properly not only leave the discussion to the other defendants but abide by the decision upon it. I cannot approve

of any party, after a decree which he did not oppose, re-opening the discussion by an appeal on rehearing. As to such a party the proceeding is in effect an original hearing. What might be the result of such an attempt by an ordinary party I need not now decide, because, in cases of charities, the Court is less strict in enforcing its rules of proceeding, and will not on such an objection refuse to hear such case as the Attorney General may have to make; and this leads to the consideration of what the case is which the Attorney General can make on this rehearing. The only case that he can make, and that which he has attempted to make, is that the bill ought to have been dismissed; that is, so far as the cause is concerned, the Court ought to have decided that although the directions of the will and the decree have been wholly neglected, and the charity property therefore misapplied, the town of Reading is, nevertheless, to continue in the enjoyment of the property.

Such, in point of form, must be the contest of the Attorney General; but such is not and cannot be his object. But finding that the decree shuts out the case which he had thought it right to present to the Court upon an information, he takes this step to remove the impediment out of his way. This, again, shews how unfortunate it was that he did not raise the whole case in the Court below, which might or ought to have been done by the cause and information being heard together. The Court is well justified in regretting and probably in complaining that this was not done; but I do not think it right on these grounds to decline giving my opinion on the points now raised for the first time by the Attorney General.

I proceed, therefore, to consider them, bearing in mind that this is a gift to a corporation on certain charitable trusts, with a proviso that on a certain event such gift shall cease and the property be transferred to another corporation for certain other charitable trusts; and that the event upon which such cesser and transfer were directed to take place has happened. The case of *Brown v. Higgs* was cited, as proving that the gift over could not take effect from the act of the trustees. That case does not only not support that propo-

sition, but proceeds on a principle inconsistent with it; for it only on this point decided that the object of a testator should not be disappointed by the neglect of a trustee. But in this case the testator has made the gift over to depend upon the act of the trustees; and to hold that the act of the trustees was inoperative, for the transfer would be to depart from, and not to perform his object. The Attorney General contends that this provision for cesser and transfer was void, as repugnant to the original gift. This is so if the original gift was indefeasible, but not otherwise; and this is the question. That proposition, therefore, is only a consequence of the point in dispute if decided one way, and not an argument for that decision.

It was then argued that it was void, as contrary to the rules against perpetuities. These rules are to prevent, in the cases to which they apply, property from being inalienable beyond certain periods. Is this effect produced, and are these rules evaded by the transfer, in a certain event, of the property from one charity to another? If the corporation of Reading might hold the property for certain charities in Reading, why may not the corporation of London hold it for the charity of Christ's Hospital in London? The property is neither more nor less alienable on that account.

The next argument was, that the forfeiture created by the will was destroyed by the decree, and that the forfeiture created by the decree was inoperative, being beyond the jurisdiction of the Court. These arguments are very little consistent. If the Court exceeds its jurisdiction in the provisions for the transfer, the provisions of the will are not affected by it. But, in fact, the decree only varied the first trusts prescribed by the will, substituting others, but preserved the forfeiture under the will or under the decree: whichever be the operative power is not material, it being established that the event has happened which under either was to create the cesser and transfer. In answer to this it was contended that the bill sought relief only under the provisions of the will; but that is not so, for the bill alleges that the plaintiffs are advised that, under the circumstances before stated, the limitation over, in favour of the plaintiffs, contained in the

will, has taken effect, and that the plaintiffs are now entitled under the provisions of the will and of the decree to have the property transferred to them.

But, lastly, it was contended that the plaintiffs' claim was barred by more than twenty years having elapsed since the facts which were stated to have created the forfeiture and since the plaintiffs knew of these facts. Time is permitted to create a bar in order to quiet titles. Is, then, the Attorney General contending that time has sanctioned the breaches of trust committed by the corporation of Reading, and that the purposes to which they applied the trust property are not to be disturbed? This cannot be, and is not, the object of the Attorney General. The object is to let in the jurisdiction of the Court for the purpose of having the property applied to purposes to which the corporation of Reading were directed to apply it as much as those to which the corporation of London were directed to apply it. Is this questioning the title of the corporation or of those who now claim in their place? The question is not whether time be a bar to any claim adverse to the title of the original donee, but whether such title is to be superseded in favour of those to whom, upon failure of such title, the testator has given the property, or in favour of general charity unconnected with any expressed object of the testator. If, indeed, there were adverse claims between *cestuis que trust*, time might create a bar between them, though it could not as between the *cestuis que trust* and the trustee, on the principle ultimately established in *Cholmondeley v. Clinton* (9). But that is not the case here.

Both the contending parties, the Attorney General and the plaintiffs, under the same facts, claim the property which, up to the present time has remained in the hands of the forfeiting party, who no longer disputes the forfeiture. As between the Attorney General and the plaintiffs there has not been any adverse title or possession; some confusion may have arisen from the use of the word "forfeiture." In one sense the cesser of one set of trusts and the commencement of the other may be considered

as a forfeiture, but the form and substance of the provision is rather a substitution of one trust for another. The property was vested in the corporation of Reading, but in a certain event they were to become trustees of it for Christ's Hospital; and as to the 50*l.* per annum, they were directed to pay it to the treasurer of Christ's Hospital; and as to the corpus of the property, their first trust having ceased, they were directed to pay it to the corporation of London, for the benefit of Christ's Hospital, as before directed with respect to the 50*l.* per annum, and they were directed to convey and transfer the same accordingly. Now, if the effect of these provisions was to constitute the corporation of Reading, in the events which have happened, trustees for Christ's Hospital, until they transferred the property as directed, and such it would seem was the only duty they had to perform, there would not have arisen as between them and the plaintiffs any question of time or of adverse possession; but that is not the question which I have to consider. It appears to me that the Attorney General cannot maintain the points he has attempted to establish upon this rehearing, and that the decree of the Vice Chancellor must be affirmed.

V.C. }
Nov. 24; } WRIGHT v. BARNEWALL.
Dec. 3. }

Legacy Duties—Liability of Executors and Legatees—Claim of Crown on Residuary Estate.

A testator by his will gave certain annuities and legacies, and directed, as to some of them, that the legacy duty thereon should be paid out of his residuary estate, but as to others, he directed that the legacy duty should be deducted. The executor only partially paid the legacy duties, and left various sums unpaid on both descriptions of annuities and legacies. The Commissioners of Stamps and Taxes claimed a lien upon the residuary estate of the testator for the unpaid legacy duties in priority over the costs of the suit and the unpaid legacies:—Held, that the executor was personally a debtor to the Crown for the amount of legacy duty where he had deducted it; and where a payment had been

made to the legatee without deduction, the legatee, as well as the executor, was liable with respect to the duty which the legatee ought to have seen paid, but the Crown had no claim upon the residuary fund.

The petition in this case stated that John Biddulph, the testator in the cause, by his will, dated the 29th of September 1828, and certain codicils thereto, bequeathed to various persons, annuities and legacies, and amongst them an annuity of 100*l.* to one of the petitioners, and 25*l.* to the other petitioner; and, as to some of the said annuities and legacies, the testator directed that the legacy duty payable in respect thereof should be paid out of his residuary personal estate, and as to other of the said annuities and legacies, the testator directed the legacy duty payable in respect thereof to be deducted from such bequests; and the testator gave the residue of his personal estate and effects equally between Anthony George Wright Biddulph and John Wright, and he appointed the said A. G. W. Biddulph and John Wright executors of his said will. The testator died on the 2nd of August 1835, and, shortly afterwards, his said will and codicils were proved by John Wright alone.

The petition further stated that the testator's personal estate was much more than sufficient to pay his debts, and funeral and testamentary expenses, and the annuities and legacies bequeathed by his will. That on the 17th of December 1840 a fiat in bankruptcy was duly issued against the said A. G. W. Biddulph and John Wright, as bankers, and the defendants, Thomas Barnewall, W. B. C. Weld, and E. G. Charlewood, were duly appointed assignees under the said fiat. That a bill was filed for an account of the personal estate of the testator, and for a due administration thereof; that the suit came on to be heard in February 1844, and a reference was directed to the Master to take the usual accounts; that it appeared from the Master's report that all the annuities and legacies bequeathed by the testator had been paid up to that date, but that no provision had been made for the future payment of the before-mentioned annuities to the two petitioners, and that the residue of the testator's estate had been paid into court to the credit of the cause; and the Master found that the legacy duty upon the

annuities to the said petitioners had been satisfied, but that the duty upon some of the legacies so given by the testator were still unpaid. That the total amount of unpaid legacy duties, which were directed by the testator to be paid out of his residuary estate, amounted to 135*l.*; that the total amount of unpaid legacy duties which were not directed to be paid otherwise than by the respective legatees themselves out of their legacies, amounted to 800*l.*; that Her Majesty's Commissioners of Stamps and Taxes claimed to have all the said unpaid legacy duties paid and satisfied out of the said testator's estate in the first instance, and before and in priority to the costs of these suits, and to any provision being made, as directed by the testator, for securing, by investment, the payment of the said annuities to the petitioners; and they also claimed to have the legacy duty on the residue of the testator's estate, if any, paid: whereas the petitioners insisted that the personal estate of the testator ought, after paying the costs and expenses of this suit, to be applied, without reference to any unpaid legacy duty or duty on the residue, in providing, according to the directions in that behalf in the testator's will, for the payment of the annuities to the petitioners; and the assignees of the bankrupts contended that such legacy and residuary duties, either entirely or so far as regarded such of the said pecuniary legacies, the duty on which was directed to be paid out of the testator's residuary estate, either could not now be recovered or that the right of the Commissioners of Stamps and Taxes, if any, in respect of such duties, was one of proof in bankruptcy only against the separate estate of John Wright, or was a right of personal demand against him the said John Wright only; and the petition prayed that the question as to the legacy duties might be disposed of by the Court, and that no part of such duties might be raised or paid out of the testator's estate without first satisfying the costs, charges and expenses of this suit, and also providing, according to the directions of the will, for the due and proper payment, during the lives of the petitioners, of the said annuities of 100*l.* and 25*l.*

Mr. C. P. Cooper and *Mr. Cooke* appeared in support of the petition.

The Solicitor General and *Mr. Maule*, for the Crown, cited the 36 Geo. 3. c. 52, and the following cases:—

Hill v. Atkinson, 2 Mer. 45.

Foster v. Ley, 2 Bing. N.C. 269; s. c. 5 Law J. Rep. (N.S.) C.P. 17.

Thomas v. Montgomery, 3 Russ. 502.

Stow v. Davenport, 5 B. & Ad. 359.

Mr. Bethell and *Mr. Hislop Clarke* appeared for the residuary legatees, and relied on the 6th section of the statute, which made the claim for duty personal against the executor and legatee, and not payable out of the residue.

His Honour reserved his judgment.

Dec. 3. — The VICE CHANCELLOR. — I have nothing to do now with the general case, but the point upon which I am to decide comes before me upon a petition in the cause; and the question is whether, under the statute 36 Geo. 3. c. 52, it being the case of an executor who has wholly or partially paid the legacy duty, the Crown has a lien against the unpaid part of the legacy or residue, for the duty which ought to have been paid. It appeared to me, when the case was argued, that there was no ground for that; but at the same time I thought it rather an important case, and I wished to consider the statutory clauses and the cases which were cited, to the principle laid down in which I entirely subscribe; but my opinion is they have nothing whatever to do with the question. I think that the construction of the statute is, that the executor shall be a debtor to the Crown for the amount of the duty where he has deducted it, and where a payment has been made to the legatee without reduction, the legatee as well as the executor is liable with respect to the duty which the legatee ought to have seen paid, and that the Crown has no claim upon the residuary fund.

M.R. }
Nov. 7, 12. } RANELAGH v. RANELAGH.

Legacy—Lapse—Gift to Children of a Legatee not implied after an express Estate for Life.

Bequest of pecuniary legacies to each of

four persons for life; interest at 5l. per cent. to be paid until the heir attained twenty-one, and in case of the demise of any of the above parties without legitimate issue, then his or her proportions were to be divided amongst the survivors. After the testator's death, one of the legatees married and died, leaving three children surviving:—Held, that as the legacy was expressly limited to the legatee for life, and as the gift over did not take effect, the gift to him was defeated, and no gift to the children was to be implied, and, as the legatee by express words took no interest beyond his life, the legacy lapsed, and that the residuary legatee was entitled.

Lord Ranelagh, by his will, dated the 20th of August 1814, after several devises and bequests, gave and bequeathed his residuary personal estate upon trust for the benefit of his son, the present Lord Ranelagh, with remainders over. And the testator, by a codicil to his will, dated the 18th of December 1818, expressed himself as follows:—"My daughter, Mary Ann Jones, having a fortune of 10,000*l.* which I hold in trust for her, I give her for the present only 200*l.* to buy mourning. I give to my two daughters Sarah Antonia Jones and Louisa Jones during their natural lives 4,000*l.* each. I give to my two sons Thomas Cowley Jones, and Thomas Edward Jones 2,000*l.* sterling each during their natural lives: legal interest at 5*l.* per cent. is to be paid to all of them in equal quarterly payments commencing from the day of my decease till my son the Honourable Thomas Jones or my heir in entail attains his or her twenty-first year of age. To prevent any mistake or misconception of my intentions, I repeat my intentions respecting the above legacies in figures.

"To Mary Ann Jones 200*l.* to be paid forthwith.

Sarah Antonia Jones . . . 4,000 <i>l.</i>	) 5 per cent. interest to be paid quarterly till my heir is twenty-one years of age.
Louisa Jones . . . 4,000 <i>l.</i>	
Thomas Cowley Jones 2,000 <i>l.</i>	
Thomas Edward Jones 2,000 <i>l.</i>	

"In case of the decease of any of the above parties without legitimate issue, their, his or her proportion to be divided equally amongst the survivors."

By another codicil without any date, the testator expressed himself as follows:—

"It is my most earnest request and desire to Lady Ranelagh and my heir, whoever that may be, that my daughters Mary Ann, Sarah Antonia, and Louisa shall live as much as possible together, at all events for the first year after my decease.

"I hereby constitute and appoint Lady Ranelagh, my daughters Mary Ann and Sarah Antonia Jones my executrices.

"My friend W. Knight has a will of mine in his possession. The above legacies to be paid out of monies I have in the public funds."

The testator died on the 4th of July 1820, and his will and codicils were proved by the executrices.

At the original hearing (1), it was contended, on behalf of the two daughters and the two younger sons, that they took an absolute interest in their respective legacies, on the ground that the gift over, in case of the demise of any of them without issue, was to be referred to an indefinite failure of issue. Sir John Leach, and Lord Brougham, on appeal, declared that the legatees were entitled to interest on the legacy until the plaintiff attained twenty-one; and upon the plaintiff attaining twenty-one, it was ordered that the several legacies should be carried over to the separate accounts of the several legatees, and the dividends were to be paid to the legatees for life, or until further order; and upon the death of any or either of the legatees, liberty to apply was given to any persons interested.

The sum of 4,149*l.* Bank annuities was carried over to the separate account of Sarah Antonia Jones, who died on the 21st of August 1840 without ever having been married.

Petitions were then presented (2) by the personal representative of Sarah Antonia Jones, and by the other legatees asking for payment to them of the 4,149*l.* But it was considered that the survivors took the fund absolutely, and it was ordered to be equally divided among them. The sum of 2,074*l.* consols was also carried over to the separate account of Thomas Cowley Jones, who died on the

(1) 2 Myl. & K. 441; s. c. 1 Law J. Rep. (n.s.) Chanc. 183.

(2) 4 Beav. 419.

13th of March 1849, having on the 9th of May 1829 intermarried with Clara Clare, by whom he left three children surviving.

Two petitions were now presented, the one by Clara Elizabeth Jones, Theodosius Henry Clare Jones, and Sarah Matilda Jones, the infant children of Thomas Cowley Jones, and the other by Lord Ranelagh, claiming the 2,074*l*.

Mr. Roupell and *Mr. Bigg*, for the infant children of Thomas Cowley Jones.—The testator separated these legacies from the residue, and gave them to several legatees by name during their natural lives, with a benefit of survivorship in case of the demise of any without issue. The legatees have been held to take a life interest only, but the words "dying without issue" implied a gift to the children of the legatee. The gift over was not on the failure of issue generally; but it took effect on the death of the tenant for life without issue. These words must have some meaning attached to them. They raised a necessary implication in favour of the children of the legatee, and a contrary intention cannot be imputed to the testator.

Ex parte Rogers, 2 Madd. 449.

Andree v. Ward, 1 Russ. 260; s. c. 4 Law J. Rep. Chanc. 98.

Lethieullier v. Tracy, 3 Atk. 774.

Harman v. Dickenson, 1 Bro. C.C. 91.

Greene v. Ward, 1 Russ. 262; s. c. 4 Law J. Rep. Chanc. 99.

1 *Jarm. on Wills*, 490.

Mr. Giffard, for the personal representative of Thomas C. Jones.—The gift to the survivors has been held valid; the words "without issue" mean issue living at the death. In the decree that has been made, there is no declaration that the legatee took a life interest only. If, however, a partial interest was given to a legatee, and the capital was given over on a particular event which did not happen, the legatee who took the partial interest would, by implication, take an absolute interest.

2 *Rop. Leg.* 392, 3rd ed.

Crowder v. Clowes, 2 Ves. jun. 449.

Waineuright v. Waineuright, 3 Ves. 558.

Goodright dem. Hoskins v. Hoskins, 9 East, 306.

NEW SERIES, XIX.—CHANC.

Mr. Turner and *Mr. Calvert*, for Lord Ranelagh.—This was a general lapse of this legacy, and the personal representative of Thomas C. Jones took no interest — *Leake v. Robinson* (3). Could the children of the legatee take by implication? The disposition was imperfect. The testator might have preferred his son to the issue of the legatee. The gift was confined to the legatees themselves, and whatever might have been the intention if it failed, it was for the benefit of the residuary legatee—*Cooper v. Pitcher* (4).

Mr. Cox, for the personal representative of the testator.

Mr. Roupell, in reply.

Nov. 12.—THE MASTER OF THE ROLLS.—The late Lord Ranelagh, by his will, gave his residuary personal estate in trust for the benefit of the plaintiff Lord Ranelagh for life, and after his death for the benefit of his first and other sons, with other limitations over. By his first codicil he gave to his daughters Sarah Antonia Jones and Louisa Jones during their lives 4,000*l*.; and to his sons Thomas Cowley Jones and Thomas Edward Jones 2,000*l*. sterling each, and after giving directions respecting the payment of interest, and enumerating his legacies, he expresses himself thus:—"In case of the decease of any of the above parties without issue, their, his or her proportion to be divided equally amongst the survivors." By another codicil, he stated that the above legacies were to be paid out of the monies which he had in the public funds. Upon the hearing of the cause, it was determined that the words in the first codicil "decease without issue" ought to be construed with relation to issue living at the death of the legatees respectively; and the legacies were ordered to be carried to the separate account of each legatee, with directions to pay the dividends to each legatee for life, with liberty for any person interested to apply on the death of the legatee. The decree was affirmed, upon rehearing before the Lord Chancellor. Upon the death of Sarah A. Jones, one of the legatees, without having been married, the legacy settled to her

(3) 2 Mer. 393.

(4) 4 Hare, 485; s. c. 16 Law J. Rep. (N.S.) Chanc. 24.

account was claimed, first, by her legal personal representative; secondly, by the surviving legatees, and, thirdly, by Lord Ranelagh, who contended that the gift to the survivors was for life only, and not an absolute gift. It was held that the survivors of the legatees took the legacy absolutely. Another of the legatees, T. C. Jones, is now dead, and he has left three children him surviving. On this occasion two petitions are presented, one by the children of the legatee, who claim the fund by virtue of the gift, which they say may be implied from the terms in which the gift over to the survivor is expressed, "on decease without issue;" and the other petition is by Lord Ranelagh as residuary legatee, who, in the absence, as he alleges, of any gift over to the survivor of the legatees, claims to be entitled to the legacy as part of the testator's residuary estate.

The question, therefore, is, whether, as against the residuary legatee, a gift to the children of a particular legatee for life is, in the absence of any express gift, to be implied from the circumstance of the gift over being made dependent on the legatee for life dying without issue living at her death. If the legacy had not been expressly limited to the legatee for life, I apprehend that in the event that has taken place, the gift over not having taken effect, the legatee would have taken the legacy absolutely; the gift to him would not have been defeated and the gift to the children would not have been implied. In this case the legatee, by the express words of the codicil, takes no interest beyond his life, and if there be no further gift of the legacy, the residuary legatee, who takes all that is not otherwise disposed of, must be held entitled. The issue of the legatee is named in the codicil only in the contingency of the description that is mentioned when the legacy is given over. I am unable to find anything which assists me to collect an intention that the gift is to the children. I can collect no particular intention to give this legacy to particular legatees, and I cannot answer the question proposed by Sir Thomas Plumer in *Ex parte Rogers*, where the children were named in the will in the gift over; but in that case there seems to have been found some further

reason, which does not exist in this case, for inferring an implied gift. I think it extremely probable the testator did mean to make a gift to the children, but *si voluit non dixit*. I think there is not sufficient to raise an implication. Upon the whole, I am of opinion that the legacy falls into the residuary estate. Of course, the costs of all parties upon both petitions must be paid out of the estate.

M.R. }
May 24; } DUGDALE v. DUGDALE.
Nov. 8. }

Costs—General Estate or particular Fund liable to Costs—Bequest—Unascertained Parties, Inquiry to ascertain.

A testator devised his real estate to a trustee for 1,000 years, to raise, by sale or mortgage, 2,000l., "to be equally divided amongst such of his next-of-kin, both maternal and paternal, as should be living at the time of his death." The devisee filed his bill, asking for an inquiry to ascertain the parties entitled to the 2,000l. Various proceedings were taken in the Master's office, in the course of which the sum of 2,000l. was raised; the Master made his first report, finding who were the next-of-kin ex parte paternâ, and also stating that C. B. was one of the next-of-kin ex parte maternâ; but upon a subsequent reference he found C. B. to be the only next-of-kin ex parte maternâ:—Held, that the testator's estate was, from the first, liable to the costs of the inquiry, and that the money being raised and set apart before the next-of-kin were ascertained made no difference, and that the costs must be raised out of the testator's estate.

Henry Geast Dugdale, by his will, dated the 17th of December 1839, devised his real estates to the plaintiff, William Stratford Dugdale, for the term of 1,000 years, in trust to raise, by sale or mortgage, the sum of 2,000l., to be equally divided amongst such of his next-of-kin, both maternal and paternal, as should be living at the time of his death.

The plaintiff was his heir-at-law, and also his sole trustee and executor, and he filed this bill, alleging that he was unable

to discover who were the next-of-kin pointed out, and entitled under the will, and he prayed, amongst other things, a reference to the Master to inquire who were the next-of-kin entitled to the 2,000*l.* directed to be raised out of the real estate, and the share to which they were respectively entitled.

The defendants were all of them infants, and by their answers only submitted their rights to the protection of the Court.

By the decree dated the 29th of June 1841, after directing the usual accounts, it was referred to the Master to inquire who were the next-of-kin, both maternal and paternal, of the testator, living at the time of his death, and the Master was to inquire of what real estate the testator died seised.

The Master, by his report, dated the 10th of May 1844, found that Louisa Anne Dilke and Penelope Packe were the only next-of-kin on the paternal side living at his death, and that Charles Baldwyn was one of the next-of-kin of the testator on the maternal side, and that no other person had claimed to be such next-of-kin.

By an order made on further directions, on the 22nd of July 1844, it was declared that the 2,000*l.* was well charged on the premises comprised in the term of 1,000 years created by the will, and certain accounts and inquiries were ordered to be made, and directions were given respecting the sum of 2,000*l.* and interest, and the Master was ordered to inquire whether the same should be raised by sale or mortgage.

A sufficient sum was afterwards raised by sale for payment of the 2,000*l.*, and the interest thereof, which, at the date of the Master's report, amounted together to the sum of 2,558*l.* 2*s.*

By a subsequent order, dated in August 1847, the sum of 2,563*l.* 13*s.* 4*d.*, the amount of the principal sum of 2,000*l.* and interest thereon up to the 17th of August 1847, was paid into court by the plaintiff to the account of the next-of-kin of the testator, Henry Geast Dugdale.

On the 18th of December 1847 a further inquiry was directed, and by a report dated the 29th of January 1849, the Master, after great inquiry, and taking much evidence, found, what he was unable to find at first, that Charles Baldwyn was the only

next-of-kin of the testator on the maternal side, living at the time of his death.

The petition was now presented by Louisa Anne Dilke, and by Edmund Packe, James Packe, and Augustus Packe, the executors of Penelope Packe, deceased, praying for the payment to them of their respective thirds, and further praying that their costs of making out, proving, and establishing their respective claims before the Master, as well as of the petition, might be paid to them out of the fund raised or to be raised from the real estate of the testator; and a stop order having been obtained by Richard Jacques Spooner Winterton, it was prayed that he might pay the costs occasioned by giving him notice of this petition.

Mr. Turner and *Mr. Spooner*, for the petitioners, the next-of-kin *ex parte paternd.*—Some costs have been incurred by the inquiries, but though the petitioners were not parties to the suit, still they were in the same situation as if they had been, and ought not to bear the costs of establishing their claim.

Shuttleworth v. Howarth, 4 Myl. & Cr. 492; s. c. 10 Law J. Rep. (N.S.) Chanc. 2.

Hutchinson v. Freeman, 4 Myl. & Cr. 490; s. c. 10 Law J. Rep. (N.S.) Chanc. 3, n.

Mr. Daniel, for Mr. Baldwyn, the only next-of-kin *ex parte maternd.*—The question to be determined is between two sets of costs. The legacy is given in a way to render inquiry necessary, and until the individuals were ascertained there was no means of carrying it out. The first report was imperfect, as the fund could not be carried to the separate account of each; a second reference was then directed, and pending these inquiries the fund liable to pay must be considered as one entire fund, and all the costs not costs of suit must be borne by the entire fund.

Mr. Stevens, *contra.*—The general estate of the testator ought not to be made liable for the costs incurred by these parties in establishing their respective claims; but if any costs are to be given, the party claiming *ex parte maternd.* is not entitled to costs after the fund was carried over to the account of the parties claiming *ex parte*

paterna. Persons going before the Master usually bear their own costs, such as creditors and next-of-kin, unless they are subsequently permitted to mix as parties in the suit, when they may be entitled to their costs—*Waite v. Waite* (1). But though costs of an administration suit are given out of the estate, and not out of any particular fund, that rule does not apply where the questions to be determined, as in the present case, arise between persons interested in a particular fund, which has been separated from the bulk of the estate. Here the trustees have set apart the 2,000*l.*, and if not altogether, yet from the time it was set apart, the costs of the inquiries in the Master's office must be paid out of the 2,000*l.*

Jenour v. Jenour, 10 Ves. 562.

Wallis v. Williams, Beames on Costs, 227.

Mr. Turner, in reply.—The inquiries were necessary before any mortgage or sale could be made of the estate; the costs of the inquiries may, therefore, be considered as costs in the cause.

Nov. 8.—The MASTER OF THE ROLLS.—The fund standing to the account of the testator's next-of-kin belongs in equal third parts to Louisa Anne Dilke, one of the next-of-kin of the testator living at the time of his death, to Edmund Packe, James Packe, and Augustus Packe, the executors of Penelope Packe, another of such next-of-kin, and to Charles Baldwyn, the only other of such next-of-kin. But a question is raised whether the next-of-kin are entitled to any costs of making out their title, or any costs incurred since the fund was set apart. As the fund could not be distributed, or the charge satisfied without ascertaining who were the next-of-kin, and as the question, who were the next-of-kin, unavoidably arose under the will of the testator, I think that his estate was from the first liable to pay the costs of the inquiry, and that, having regard to the state of the cause, the circumstance of the money being raised and set apart before the next-of-kin were ascertained, does not make any difference. I think, therefore,

(1) 6 Madd. 110.

that the whole of the costs asked for by the petition must be raised.

[See *Michell v. Michell*, 4 Beav. 549.]

V.C. } GLEADOW v. THE HULL GLASS
Nov. 17. } COMPANY.

Company—Liability of Directors—Purchase of a Patent—Sanction of Shareholders.

A company having been formed for the manufacture of glass, the directors entered into a contract to purchase a licence to use a patent for certain improvements in making glass, and constituted themselves trustees for the company. The purchase was subsequently sanctioned by a general meeting of the shareholders, but the speculation proving unsuccessful, dissatisfaction arose, and the directors were dismissed:—Held, that the company by reason of their having sanctioned the contract, were bound to indemnify the original directors against their liabilities in respect of the purchase.

The bill stated that in 1846 a company was formed for the purpose of making and manufacturing glass, under the name of "The Hull Glass Company;" that on the formation of the company a deed of settlement was executed, dated the 27th of March 1846, by which it was agreed that the business of the company should be the manufacturing and vending of glass of every description, such as plate glass, crown glass, &c., and such other descriptions, kinds, and varieties of glass as should from time to time be invented or discovered by, or be made known to the company, or any other person or persons whose invention or discovery the company might at any time thereafter be lawfully authorized to use and exercise, or should purchase or otherwise lawfully acquire; that there should be five directors, and that the plaintiffs, G. Buckton, T. Wilson, and T. Gleadow, and the defendants, W. Farthing and R. Wake, should be the first directors, who were to have the entire management and superintendence over the affairs and concerns of the company, but, nevertheless, in strict conformity with the

laws and regulations thereby or thereafter to be established; that the company was completely registered, and the business thereof was carried on till the month of January 1847, when it became known that a person named Bedford had obtained a patent for certain improvements in staining and etching of sheet glass, and negotiations took place between him and the directors for a licence to use the inventions, and divers resolutions were come to at the meetings of the directors, duly held, and ultimately it was resolved by the directors, that a licence for the company to use the invention should be purchased from Bedford for the sum of 500*l.* to be paid down, and for the annual sum of 150*l.* to be paid to him during the continuance of his letters patent. That it was arranged and agreed by the board of directors and Bedford that such licence should be granted to the then five directors as trustees for the company, and three deeds were thereupon prepared by Mr. Thorney, the solicitor for the company, for the purpose of carrying out such arrangement, and were executed on the 27th of January 1847, and the sum of 500*l.* was paid according to the agreement to Bedford, and the directors entered into a covenant to secure the due payment of the annuity. That a general meeting of the company was held in the month of March 1847, at which meeting a report was made and read to the shareholders then present, which stated that the licence had been obtained and the terms upon which it had been purchased were fully set forth, and the report was adopted and confirmed by the meeting, and great satisfaction was expressed by several of the shareholders present with the report and with the purchase so made. That in the month of January 1848 the five directors first appointed ceased to be such directors of the company, and new directors were appointed in their place. That the company subsequently continued to use the invention the licence for which had been so granted by Bedford. That in the month of April 1848 Bedford applied to the plaintiffs and required them to pay him for the two half-yearly payments of the said annuity which had become due, and

thereupon the plaintiffs applied to the company and to the present directors thereof, and requested them to pay such annuity and to take an assignment to some other trustees of the licence, but they declined to do so. That on the 25th of May 1848, Bedford commenced an action against the plaintiff Gleadow for the recovery of the arrears of the annuity, and that the company still refused to pay the amount or to defend the action. That the three plaintiffs had joined together for the purpose of these proceedings, as being jointly liable under the covenants entered into by them while such directors as aforesaid; but the other first appointed directors, W. Farthing and R. Wake declined to concur with them as plaintiffs in this suit, and they had consequently been made defendants thereto. The bill, therefore, prayed that the Hull Glass Company might be declared liable to indemnify the plaintiffs and the defendants Farthing and Wake from the payment of the said annuity, and the costs incurred in respect of the action brought against them.

The defendants, the present directors of the company, by their answer admitted the allegations in the bill respecting the formation of the company, and the execution of the deeds upon the purchase of the invention of Bedford; but they alleged that it turned out that the patent was of no practical utility; that the plaintiffs had entered into the purchase with great recklessness, and without having tested the value of the patent; they admitted that the report of the plaintiffs, setting forth the purchase, was confirmed by a general meeting of the shareholders; but they denied that the terms upon which the patent had been purchased were fully stated in such report; that the plaintiffs had throughout their management as directors exhibited great general improvidence, and had involved the company in considerable embarrassments by their wasteful expenditure, and it was owing, in a great degree, to such mismanagement that the defendants had at present no funds available to discharge the plaintiffs' claim; that the process, the subject of the patent, had been used after the plaintiffs ceased to be directors only for the purpose of work-

ing up the unfinished materials, but that it had now been discovered that the invention was a failure, and the use of it had since been discontinued altogether.

Mr. Bethell and *Mr. Glasse* appeared for the plaintiffs, and contended, that they were fully justified in entering into the engagement for the purchase of *Mr. Bedford's* patent, and that the subsequent acts of the company had sanctioned the contract. It had been contemplated when the company was first formed, that any inventions for improvements in making glass should be purchased by the company, and it was not the fault of the plaintiffs if the patent had not been successful.

Mr. Stuart and *Mr. Goodeve* appeared for the defendants, and urged the different objections raised by their answer.

Mr. Giffard and *Mr. Anstey* appeared for the defendants *Farthing* and *Wake*.

THE VICE CHANCELLOR.—This is a very simple case. It appears that these gentlemen at *Hull*, like other speculators, wanted to get rich by manufacturing glass, and a company was formed for the purpose. The plaintiffs and two of the defendants were appointed directors, and in the course of the year 1847 they entered into a treaty with *Mr. Bedford*, which ended in the purchase of a licence from him for liberty to use his patent. This purchase was effected in the names of the five directors who executed three deeds, by which they became trustees for the company, and they entered into a covenant for the payment of an annuity to the patentee. After that, in March 1847, a meeting of the shareholders took place and a report was presented by the directors stating that they had made the purchase. Now, if there had been any falsehood set forth in that report, then there would be grounds for saying that it ought not to be sanctioned; but, as I understand it, the objection to the report is, that it states too little, that is, that it does not state the terms upon which the contract was entered into, but if there was an assemblage of shareholders called together for the purpose of considering whether they should confirm the report, when all of them might have spoken against it, and at such meeting the report was confirmed, I think

they have bound themselves. Then, it appears the licence was acted upon till September, when there was a representation made which shewed that the undertaking was not so advantageous as was expected. After this, dissatisfaction was expressed against the directors which ended in disgust, and the said directors were cashiered; but my opinion is that the right of the directors to an indemnity from the company arose when at the general meeting the shareholders thought fit to adopt the resolution proposed to them. There must therefore be a decree according to the prayer, and the company must pay the costs of the suit.

M.R. }
Dec. 21, 22. } *In re WILLIAMS.*

Power—Appointment—Vested Interest—Vesting to depend on Event which had happened when Deed was executed—Vesting.

*An appointment, under a power in a settlement, was made, directing the trustees after the death of the tenant for life to stand possessed of 6,000*l.*, to pay the dividends to S. M. for life, and after his decease to permit T. M. to receive the dividends for his life, and after the decease of the survivor for all and every the child and children of T. M. and S. M., equally to be divided between them, share and share alike, the shares of sons to be paid, assigned or transferred at the age of twenty-one, and the shares of daughters at twenty-one or marriage, which should respectively first happen, with benefit of survivorship among the children surviving, in case any of them should die before he, she, or they should, by virtue of the trusts, become entitled to payment, assignment or transfer of his, her or their respective parts. At the time of executing the deed T. M. and S. M. had seven children, the eldest of whom was forty-three, and the youngest twenty-six years of age. One of the children died in the lifetime of the tenants for life:—Held, that the personal representative of the deceased child was entitled to her share, and not the surviving brothers and sisters.*

This petition was presented, under the 10 & 11 Vict. c. 96, in the matter of the

of the settlement made upon the age of Griffith Williams and Ann his wife by William Mills, as the personal representative of Elizabeth Mills, deceased, to make the transfer of the sum of 857*l.* 10*s.* 6*d.* consols.

the 24th of August 1786, upon the age of Griffith Williams with Ann his wife, a sum of 20,000*l.* consols was transferred to Christopher Harris and Thomas Mills, upon various trusts, and after the death of the survivor of them, without issue any child or children, upon trust for such person or persons, and for such uses and purposes as she, the said Ann his wife, should by any deed or writing or her last will direct or appoint.

the 9th of March 1787 Christopher Harris having died, Griffith Williams and his wife appointed John Cleveland to be trustee, jointly with Thomas Mills, and 6,000*l.* consols, together with 1,000*l.* 10*s.* 6*d.* consols, which had been purchased with the proceeds arising from the sale of a part of the trust property, was transferred into the joint names of Thomas Mills and John Cleveland, upon the trusts directed by the settlement.

Under an order, dated the 7th of May 1849, made upon the petition of William Mills, the Master, by his report, dated the 1st of December 1849, found that Griffith Williams and Ann his wife were both dead, that there was not any issue of the age; that Ann Williams executed a power of appointment, dated the 28th of August 1823, by which, in exercise of the powers contained in the settlement of the age of August 1786, she (amongst other things) appointed that Thomas Mills, his wife, executors, and administrators, and the trustees therein named, should stand possessed of 6,000*l.* consols, in trust, after her decease, to receive the dividends thereof, and pay the same unto Susanna Mills, the wife of the said Thomas Mills, for and after her decease, upon trust to pay the said Thomas Mills to receive such dividends for life, and after the decease of the survivor of them, the said Thomas Mills and Susanna his wife, then, upon the death of either of them, to stand possessed of the said 6,000*l.* consols for all and every the child and children of the said Thomas Mills and Susanna his wife, to be equally divided between

them if more than one, share and share alike, the part or parts of such of them as should be a son or sons to be paid, assigned or transferred to him or them at his or their age or ages of twenty-one years, and the part or parts of such of them as should be a daughter or daughters to be paid, assigned or transferred to her or them at her or their age or ages of twenty-one years, or day or days of marriage, which should respectively first happen, together with all dividends, interest, income, and improvements thereof in the mean time, unless such respective times of payment should happen in the lifetime of the said Thomas Mills and Susanna his wife, or the survivor of them, in which case the same should be paid, assigned or transferred immediately after the decease of such survivor; and in case any of the same children should happen to die before he, she or they should, by virtue of the aforesaid trusts, become entitled to the payment, assignment or transfer of his, her or their respective part or parts of the said 6,000*l.* consols, and of the dividends, interest, increase and improvement thereof, then the part or parts of him, her or them so dying should go and be paid assigned and transferred unto and to the use of the survivor or survivors of them, who should live to become entitled to have their, his or her part or parts thereof paid, assigned or transferred to them, him or her as aforesaid, together with their, his or her original part or parts thereof. That a power authorizing Ann Williams by deed to make a revocation and new appointment of the trust monies was also contained in the deed, but she died without having exercised it. That Thomas Mills died on the 5th of January 1834, and Susanna Mills died on the 26th of July 1848, having had seven children, namely, William, Susanna, Elizabeth, Mary Ann, Christopher, John, Thomas and Julia. That W. Mills, the eldest, was born on the 18th of January 1780, and that Julia Mills, the youngest, was born on the 1st of February 1797. That all of them were then living except Elizabeth, who died on the 22nd of February 1825, having attained the age of twenty-one. That on the 16th of February 1826 letters of administration had been granted to Thomas Mills, on whose death letters of administration de

bonis non, with the will of the said Elizabeth Mills annexed, were, on the 6th of July 1836, granted to the petitioner, William Mills, and that Susanna Mills, Mary Ann Mills and Julia Mills were respectively married. That Thomas Mills, the father, by his will, dated the 7th of September 1833, after divers bequests, not affecting the sum of 857*l.* 2*s.* 10*d.* consols or the dividends thereof, being the share of Elizabeth Mills, deceased, gave the residue of his estate and effects to the said William Mills, and appointed him and his wife Susanna executor and executrix of his will, who duly proved the same on the 31st of January 1834. That the several sums of 857*l.* 2*s.* 10*d.*, being one seventh share of the sum of 6,000*l.* consols, had been paid to each of the surviving children of Thomas Mills and Susanna his wife, and that the remaining sum of 857*l.* 2*s.* 10*d.* consols had, under the provisions of the 10 & 11 Vict. c. 96, been paid into court, and there remained, with the sum of 24*l.* 19*s.* 8*d.* cash for dividends thereon, in trust to the credit of this matter in the name of the Accountant General. That under two several deeds, one dated the 9th of October 1823 and the other in 1834, James Courtenay Ruffiatt and the petitioner, William Mills, were appointed trustees of the settlement of August 1786 and of the trust funds, which had been transferred to their names. The personal representative of Elizabeth Mills, and also her surviving brothers and sisters, each claimed to be entitled to her share of the 6,000*l.* under the settlement.

Mr. Roundell Palmer and *Mr. Collins*, in support of the petition.—The gift is several “to all and every the children” at certain specified times: this is a vested interest for the benefit of the donee, and her issue, if any, and it cannot be affected by the gift over—*Schenck v. Legh* (1). It cannot be supposed that the share of any child who had attained twenty-one was to be taken away, and given to other children, who might not have any children—*Jeffreys v. Reynous* (2), *Jones v. Jones* (3),

Butterworth v. Harvey (4). The two last cases turned on the word “payment,” but the time of capacity to receive and the time when payment was to be made were wholly distinct, and in this case payment must be held to refer to the time at which the party was of capacity to receive, and not with reference to the time when payment was to be made.

Mr. Turner and *Mr. Druce*, for the brothers and sisters of Elizabeth Mills.—The gift must have been intended for the children of Mr. and Mrs. Mills only. At the time of the execution of the power, the eldest was forty-three and the youngest twenty-six years of age: future children, therefore, could not have been contemplated. This is not the case of a marriage settlement, or of a provision for a party's own children. Provision was made absolutely for each child of Mr. and Mrs. Mills, and the time for payment had occurred when the deed was executed. In *Whatford v. Moore* (5), it was, in a marriage settlement, declared that the trustees of a term of 500 years should stand possessed thereof upon trust, after the several deaths of the husband and wife, and the commencement of the term, to raise for the portions of daughters and younger children of the marriage, there being an elder or only son, or the heirs of the body of such son then living, if only one such younger child, 2,000*l.*, if two, 3,000*l.*, and if three or more, 4,000*l.* for the portions of such younger children share and share alike, and to survive to the survivors and survivor of them, but so as such two surviving younger children should have no more raised than 3,000*l.*, nor any one such surviving child any more than 2,000*l.*, to be paid to daughters at the age of eighteen years or days of marriage, which should first happen after the deaths of the husband and wife, otherwise within three months next after the death of the survivor of them, and to be paid to sons at twenty-one, or sooner if the trustees should, after the several deaths of the husband and wife, in their discretion judge necessary. There was

(1) 9 Ves. 311.

(2) 6 Bro. P.C. 398.

(3) 13 Sim. 561; a.c. 13 Law J. Rep. (N.S.) Chanc. 16.

(4) 9 Beav. 130.

(5) 3 Myl. & Cr. 270; a.c. 7 Sim. 574; 5 Law J. Rep. (N.S.) Chanc. 105.

of the marriage one son and three daughters, one daughter died in the life of both her parents, after she had reached eighteen and been married, and it was held that such daughter did not become entitled to any portion of the land to be raised for younger children's uses. In this case also, the discussion between members of the same class, the deed created an interest, which was subject to be divested, in case the child did not become entitled to payment, and in that case the intention of the settlor was to be carried out, and the surviving children would become entitled.

The MASTER OF THE ROLLS intimated that this question ought to have been brought before the Court by bill; but all concurred in asking for a decision on this petition.]

. Roundell Palmer, in reply.

THE MASTER OF THE ROLLS.—It appears from the deed of appointment had been taken from some book or document with reference to the state of the parties, that they were past the age at which the land was to vest at the time of the execution of the deed; but, applying the deed to the circumstances, there was an interest given to each child in its life, but it was not payable until the death of the survivor of the tenants for life, they had a right to be paid; and when the deed was executed the children, which the fund was to vest had, still there was nothing which made the fund contingent or liable to be divested, which derogated from the duty of payment. But before finally disposing of this I will look at *Whatford v. Moore*. The costs of the application must be paid out of the fund, and, if I see no reason to the contrary in my present opinion, the residue must be paid to the petitioner as the personal representative of the deceased child.

. 22.—The MASTER OF THE ROLLS. I have looked at the case of *Whatford v. Moore*, and I see no reason to alter the opinion I expressed yesterday.

L.C. }
Nov. 6, 7. } CLEGG v. FISHWICK.

Partnership—Right of Administratrix of deceased Partner to sue after assignment of all interest to a third party—Benefit of Renewed Lease.

In 1828 A, B, C. and three other persons became co-partners, as colliers, in equal sixth shares, and took a lease of certain mines for twenty-one years. In 1836 A. died, and his widow and administratrix thenceforth to the end of the term continued to carry on the business of the partnership. In 1845 B. & C, without the privity of the rest of the firm, obtained for themselves exclusively a reversionary lease of the same mines. On the expiration of the original lease in 1849, B. & C, being in exclusive possession, gave notice of dissolution, and claimed a right to purchase the partnership stock. The administratrix of A. then filed her bill for a dissolution, and the usual accounts, and for a declaration that the renewed lease formed part of the partnership assets, and for a receiver. On a motion for a receiver,—Held, affirming the decision of the Court below, that the plaintiff as the representative of her husband, had a *prima facie* interest in the renewed lease; and a receiver was ordered of her one-sixth, including such renewed lease.

In 1839 the administratrix and her children, by deed, joined in assigning all the intestate's estate to arbitrators named for the purposes of partition, and in the same year the arbitrators allotted all the intestate's "colliery shares" to the children absolutely:—Held, that the plaintiff, as administratrix of her husband, was under liabilities and had duties to perform respecting the partnership, from which she could not discharge herself by the assignment; and that therefore she had, notwithstanding, sufficient interest to sustain the suit; and that the children were not necessary parties.

In January 1828 Clegg, the late husband of the plaintiff, the defendants Fishwick and Massey and three other persons, commenced the working of certain coal mines, as co-partners, in equal sixth shares; and in June 1828 a lease of the mines was granted to these six parties for twenty-one years from the 15th of January preceding.

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In November 1836 Clegg died. The plaintiff, his widow, took out administration, and continued to act and was recognized as a partner in the concern; and as such received one equal sixth share of the profits up to January 1849, when the lease of 1828 expired. In December 1845 Fishwick and Massey obtained, on their individual account and without notice to the other partners, a reversionary lease of the collieries comprised in the lease of 1828. In May 1849, Fishwick and Massey by written notice dissolved the partnership, and called upon the plaintiff and the other partners to join in the appointment of valuers for the purpose of a sale of the partnership stock. The plaintiff refused to concur, and Fishwick and Massey being then in exclusive possession of the partnership property, the plaintiff as administratrix of her late husband filed a bill against Fishwick and Massey and the other partners, praying a dissolution, and the accounts of the partnership assets, and a declaration that the renewed lease of 1845 was partnership property, and for a receiver and manager. Immediately upon the filing of the bill, the plaintiff moved for a receiver. By the affidavits filed in opposition to the motion it appeared that by indentures of February 1839, the plaintiff and her children appointed certain arbitrators for the purpose of making a partition among them of the estate of the intestate Clegg, and by the same deeds conveyed and assigned the freehold and copyhold estate, the shares in collieries and all other the personal estate of Clegg to the same arbitrators for that purpose; and that the arbitrators by their award of June 1839, allotted and assigned all the intestate's "shares in collieries" to the children in equal shares absolutely, by way of partition; and allotted certain other property to the plaintiff. The motion coming on to be heard before Wigram, V.C., his Honour ordered that the defendants, Fishwick and Massey, refusing to undertake to pay into court one-sixth part of the profits of the partnership undertakings, including the renewed lease, it should be referred to the Master to appoint a receiver of such one-sixth.

The defendants, Fishwick and Massey,

now moved by way of appeal to discharge or vary that order.

Mr. Wood and *Mr. Elmsley*, for the appellants.—There is no equity entitling the plaintiff to claim an interest in the renewed lease. The expiration of the lease of 1828 was the termination of the old partnership, and the other partners were at liberty to make fresh arrangements from that period on their exclusive account. There was no concealment of the circumstances from the lessor for the purpose of obtaining a renewed lease, but he refused to treat with the defendants except for the exclusive grant of the lease to themselves. Secondly, the plaintiff is not the person to assert that equity if it exists; for by the assignment of 1839 and the award and allotment of the arbitrators she has been divested of all interest in the shares in the collieries. Thirdly, the children ought to be parties to the suit.

The Solicitor General and *Mr. Little*, for the respondent.

[The LORD CHANCELLOR intimated that the argument of the respondent might be confined to the question, whether the plaintiff was the proper party to assert the equity alleged in the bill.]

The plaintiff, notwithstanding the assignment of 1839, is still the legal partner in respect of the one-sixth share. She is the party both to sue and to be sued in respect of the partnership transactions. The other partners would refuse to recognize the right of the children to interfere in the partnership; for the partnership contract is between the plaintiff and the other partners only; and that contract, as between them, is not affected by this assignment—*Brown v. De Tastet* (1). The children have no independent right, but can only arrive at the equity indirectly through the plaintiff. The renewed lease is clearly partnership assets—*Featherstonhaugh v. Fenwick* (2). The plaintiff is under liabilities, and therefore has a right to realize the assets of the partnership.

Mr. Elmsley, in reply.—The plaintiff has no interest, for she has parted with that by the assignment. The fact that she has

(1) Jac. 284.

(2) 17 Ves. 310.

parted with the assets while the liabilities of the estate are undischarged will not give her an equity to sue. To make her children co-plaintiffs would be a misjoinder; to make them defendants would not cure the defect of the plaintiff's title. That, as administratrix, she has allowed the intestate's assets to remain in the partnership will not entitle her to be considered a partner for all purposes, but merely to the profits that have been made by the employment of the intestate's effects in the partnership.

The LORD CHANCELLOR.—It appears to me that, independently of the fact of the assignment of 1839, the case is a very simple one. The plaintiff's husband was engaged with several other persons in a partnership. In 1828 the partners take a lease of certain coal mines for the purposes of the partnership. In 1839 the husband died, and the plaintiff, his widow, is his administratrix. There was no provision for continuing the partnership with his representative, but it was in fact carried on between the plaintiff and the surviving partners up to 1849, the same property being used for the partnership purposes. In 1845 some of the partners, without the privity of the plaintiff, obtained a renewal of the old lease; and in 1849, at the expiration of the old lease, claimed the exclusive benefit of the new lease. The old lease was the foundation of the new lease, and at the time the contract for that was entered into by the other partners, the plaintiff had an equal interest with them in the partnership. The tenant-right of renewal arising out of the old lease gave all the partners the benefit of this new lease. That is the well-known principle of law, provided there be no circumstances to prevent its operation. For the present purpose, there is enough in that *prima facie* case to give the plaintiff a right to say, "I, having a right to assert that title and to establish it at the hearing, ask the Court to protect the property which may be forthcoming for my benefit if, at the hearing, I shall establish that right."

If the right asserted be one that clearly never can be enforced, the Court will not interfere; but if there be a *prima facie* right, as strong as that represented, the

Court will interfere and protect the property in the mean time. Then that is met by saying the plaintiff has no right at all; for though the plaintiff is the representative of one of the lessees, a partner, and though she has carried on business as such from 1836 to 1849, and for that period been recognized as such, yet she, in the year 1839, assigned all her husband's interest in the lease; that is, she executed an assignment by way of division among those who were entitled to her husband's property under the Statute of Distributions, by which she gave to her children the exclusive interest in her husband's share of the mines; that having thus parted with her interest in the mines, she cannot come here, as against the partners, to claim this as part of the partnership property. Upon consideration, and upon hearing what has been urged upon the other side, I am clearly of opinion that the plaintiff has not lost her right, nor could she thus denude herself of the duty of realizing the partnership property. Those to whom she has assigned this interest cannot do it, because they have no privity with the defendants. If, indeed, she had been simply part owner of property, not the subject of partnership, and there had been no intervening duty to be performed, the objection might have held good; but there being an intervening interest, the assignment of 1839 cannot take effect in this way. The interest proposed to be assigned is part of the partnership property, part of the property to be realized and made applicable to the settlement of the partnership affairs, before any matter could arise as the subject of assignment. That she could not part with it was a duty and liability she could not divest herself of. This property may become part of her husband's undisposed-of estate, but only that part which remained after the prior application of it according to the rules of partnership in the settlement of partnership estates. That has never yet been done. As between herself and the defendants, she is now seeking to have the partnership transactions settled, and to have the partnership property realized to meet the obligations that are now incumbent upon her in that respect. She has not parted with that right, nor has she any power so

to do. To say that she has assigned it to her children, is to say that she has done more than the law will permit her to do. She could only assign to her children what belonged to her husband as his property, and subject to the prior obligations upon it, which she, as his administratrix, is bound to discharge. I am of opinion, therefore, that she has such an interest, flowing out of her duty as personal representative of her late husband, as will give her a right to assert a title to the new lease as part of the partnership property. This is the view which the Vice Chancellor took of the case, and I think it is the correct view. Considering the nature of that interest I am satisfied it is such as she could not have parted with. The motion, therefore, must be refused, with costs.

L.C. }
Nov. 12, 13. } DE VISME v. DE VISME.

Vendor and Purchaser — Conditions of Sale — Interest on Purchase-money until Payment — Delay arising by Default of Vendors — Compensation.

On a sale, by order of the Court, in September 1845, the conditions of sale provided that the purchaser should pay in the balance of his purchase-money on or before the 26th of December 1845, and be entitled to the rents and profits from the 25th; but that if the purchaser should make default in such payment, "then from whatever cause the delay might have arisen" he should pay interest at 5l. per cent. from that time until payment, and that the vendors should deliver an abstract and deduce a good title within three days after the confirmation of the order nisi on the Master's report of purchase. The order nisi was confirmed on the 4th of December 1845. On the 23rd of December following, no abstract having been then delivered, the purchaser paid the balance of his purchase-money into a private bank to a separate account, at 2½l. per cent. interest, and gave notice thereof to the vendors. A complete title was not shewn until July 1847. The purchaser then obtained an order for payment of his purchase-money into court, with 5l. per cent. interest from the 26th of December 1845, without prejudice to his

right to compensation by reason of the delay of the vendors in completing the title. On petition by the purchaser for compensation,—Held, reversing the decision of the Court below, that either, upon the construction of the conditions, the time for payment of interest at the prescribed rate did not begin to run until a complete title was shewn, or that the purchaser was entitled to compensation out of his purchase-money for the damage sustained by him, by reason of the vendors not having fulfilled their part of the contract; but that the purchaser was not entitled to compensation for the unproductiveness of his purchase-money, the investment being his voluntary act.

The question in this case arose on a sale made under the order of the Court. By the conditions of sale it was stipulated, *inter alia*, that the purchaser of each lot should pay the remainder of his purchase-money into the Bank of England by the 26th of December next (1845), and should be entitled to the rents and profits from the 25th of the same month; and if default should be made in such payment, "then and in such case, and from whatever cause the delay might have arisen," he should pay interest at the rate of 5l. per cent. per annum on the balance of his purchase-money from that day until the payment thereof; that every purchaser should obtain, at his own expense, the usual orders for confirming and allowing his purchase, and for the payment of his purchase-money into the Bank; and that the vendors should, within three days from the confirmation of the order nisi on the Master's report of the purchase, deliver an abstract and deduce a good title to the several lots.

The order nisi on the report, allowing the present purchase, was confirmed absolutely on the 4th of December 1845. The vendors did not deliver any abstract till the 3rd of January following.

On the 23rd of December 1845 the purchaser paid the balance of his purchase-money into a private bank to a separate account, to remain at interest at 2½l. per cent. per annum, and the money remained there at that rate of interest until the 9th of August 1847. On the 29th of December 1845 the purchaser gave notice in writing to the vendors, that he had so appropriated the balance of his purchase-money, and

insisted that the difference between the interest the money was making and that required by the conditions of sale must be at the loss of the vendors so long as they delayed the delivery of the abstract. A perfect abstract was not delivered until the 11th of July 1847. The purchaser then obtained an order for payment of the balance of his purchase-money into court, with 5*l.* per cent. interest from the 26th of December 1845, without prejudice to his right, if any, to compensation by reason of the delay of the vendors in completing the title. In 1849, the purchaser being then dead, a petition was presented by his representatives, praying a reference to the Master as to whether the condition of sale as to the delivery of the abstract was or was not duly complied with by the vendors; and if he should find that it was not, then that he might inquire and state what damage the purchaser had sustained, or what compensation in respect thereof the petitioners were entitled to, either by way of reduction of interest, or otherwise, and that the amount of compensation might be deducted from the sum of stock in which the balance of the purchase-money then remained invested.

The petition coming on before Wigram, V.C., His Honour held that though the delay in the completion of the purchase was attributable to the vendors, yet, by the terms of the condition, the purchaser was bound to pay interest at 5*l.* per cent. until his purchase-money was paid—18 *Law J. Rep.* (N.S.) Chanc. 159.

The cause now came on to be heard, before the Lord Chancellor, by way of appeal.

The Solicitor General and *Mr. Shapter*, in support of the appeal.—The delivery of the abstract was a condition precedent to the purchaser's liability to pay interest. The abstract to be delivered must mean a perfect abstract—*Hobson v. Bell* (1) and *Morley v. Cook* (2). The Court will not allow the vendors to take advantage of their own wrong. The case of *Esdaile v. Stephenson* (3), upon which the decision of

the Court below proceeded, is qualified by the case of *Monk v. Huskisson* (4), decided by the same Judge, and *Paton v. Rogers* (5). The purchaser would not be allowed to pay his purchase-money into court until he had accepted the title—*Denning v. Henderson* (6). Secondly, a case of damage has arisen to the purchaser by the default of the vendors, for which he is entitled to compensation.—

Greenwood v. Churchill, 8 Beav. 413; s. c. 14 *Law J. Rep.* (N.S.) Chanc. 143.

Orme v. Broughton, 10 Bing. 533; s. c. 3 *Law J. Rep.* C.P. 208.

Mr. Rolt and *Mr. Greene*, for the vendors.—*Esdaile v. Stephenson* is conclusive that the condition as to payment of interest is binding; and the party cannot have relief except he can shew that the abstract has been fraudulently delayed by the vendors; and there is no evidence of this. In *Paton v. Rogers* there was no day named as to interest; but the decision proceeded upon the general rule of the Court. The purchaser might have obtained an order for payment of his money into court on the 26th of December 1845, leaving the question of title open—*Morris v. Bull* (7); but after having completed his purchase, he cannot come for damages.

Mr. Temple and *Mr. R. W. E. Forster* appeared for other parties.

The Solicitor General replied.

At the conclusion of the argument, the Lord Chancellor observed that it was plain that there had been a breach of the contract on the part of the vendors; but that as the authorities seemed to be in some confusion, he would take time to consider his judgment.

Nov. 13.—The LORD CHANCELLOR.—This case raises a question of some importance as to the general practice of the Court, though by no means a question of any difficulty as to what justice requires,

(1) 2 Beav. 17; s. c. 8 *Law J. Rep.* (N.S.) Chanc. 241.

(2) 2 Hare, 106; s. c. 12 *Law J. Rep.* (N.S.) Chanc. 136.

(3) 1 Sim. & S. 122.

(4) 4 Russ. 121, n.; s. c. 5 *Law J. Rep.* Chanc. 163.

(5) 6 Mad. 256.

(6) 1 De Gex & S. 689; s. c. 17 *Law J. Rep.* (N.S.) Chanc. 8.

(7) 17 *Law J. Rep.* (N.S.) Chanc. 9.

or what the rule ought to be. The difficulty arises from the decisions that have taken place, some of which are inconsistent in principle with the others; and in those which appear nearest right in point of result the decision is not always put on the same ground. Now, the simple case is this. In conditions of sale, a certain time is fixed for certain acts to be done: a certain time for the delivery of the abstract; and a certain time for the payment of the money, or interest is to run upon the money if not paid at that time. It is quite obvious that the intention of the parties was to have an opportunity, before the time came for payment of the money, and from which time interest was to run, of seeing whether the abstract shewed a good title or not. If the abstract shewed a good title, then, according to the general rule, the property would become the property of the purchaser from the time when the contract ought to have been completed; and the money would from that time belong to the vendor; the one, therefore, would be entitled to the fruits of the property and the other to the fruits of the money. That would be the practical effect of the rule in all cases where there is merely a time fixed for the performance of the contract, and where nothing specific is said as to the time from which interest is to run. Now, this rule happens to be particularly adverted to and recognized in every case which has been cited against the purchaser upon the present argument; I mean in those cases which occurred, all of them, before Sir John Leach. In *Esdaile v. Stephenson*, he, in terms, takes notice of the rule. In *Paton v. Rogers* and in *Jones v. Mudd* (8) he does the same thing. In *Esdaile v. Stephenson* he says, where the parties have fixed a time from which interest was to run, the Court cannot depart from the rule which the parties have so laid down for themselves. It does not appear very obvious why specifying in terms a contract, which the law implies though not specified, should make any substantial difference between the parties; the rule being perfectly established, that interest is payable upon the purchase-money from the time the contract ought to

be performed. There being nothing special to take the case out of the rule, it is not very apparent why the rule, though not reduced into terms in the very words of the contract, is not in its nature to be considered as part of the contract, the parties contracting according to the ordinary rules which regulate the question of interest between them. It is very true, that parties may contract so as to place themselves out of an implied rule, as that the allowance of interest shall run, not from the time that the rule of law implies, but from some other time; but in no case do I find a contract reaching this point, saying (what no purchaser whatever would say) that the purchaser is to pay interest from such a day, although he is prevented from performing his contract by the acts of the vendor. I have no doubt the truth is, that in all these cases of unforeseen events, by the words, "from any cause whatever," it is always intended to exclude that which is not expressly provided for by the contract. The question is, whether a vendor, who does not deliver an abstract shewing a good title until a period long after the time specified, and thereby fails in performing his part of the contract, and prevents the purchaser from having the benefit of his purchase until a later period, is to have the benefit of the contract against the purchaser. Nothing could be more unjust than to hold that a purchaser, having contracted to pay 5*l.* per cent. upon his purchase-money (in almost all cases exceeding the annual value of the property purchased), is liable to pay that interest from the time contracted for, though the vendor has not performed his part of the contract by delivering the abstract, so as to enable the purchaser to have the benefit of the contract. Now, there are two ways in which that may be met, on argument and on principle; either by considering the case that has happened as not within the contract, and that the party never meant to contract that he would pay interest when he was prevented from having the benefit of his purchase by the default of the vendor; in which case it would be the ordinary case of doing justice between the parties, an event having happened which was not expressly provided for by the contract: or else it may be pro-

(8) 4 Russ. 118; s. c. 6 Law J. Rep. Chanc. 28.

vided for, as the Master of the Rolls seems to have thought it ought to be provided for in the case of *Ozenden v. Lord Falmouth* (9), that interest is to be paid upon the purchase-money according to the terms of the contract with the vendor; but if the vendor has not performed his part of it, and he has exposed the purchaser to damage (the damage being the difference between the interest and the value of the property) by not performing his part of the contract, though that is a departure from the previous terms of the contract, which the Court will not regard in allowing a specific performance, yet in these cases the Court would regard it by giving to the purchaser compensation for the loss he has sustained by the non-performance of the whole contract by the vendor. If a vendor sells property under a more favourable description than properly belongs to it, or describes quantities different from the actual quantities, or professes to sell parcels of land not necessarily connected with the main body of the land, and he cannot make out a good title to the whole, the Court performs the contract; but it does so, not in the terms in which the parties made it: if the contract is for the whole estate, but the vendor is unable to make title to certain parts, but which parts are not necessary for the enjoyment of the residue, and the Court finds that in substance the contract may be performed, it will perform it; but not so as to leave to the vendor the benefit of the error, and compel the purchaser to pay the whole of the purchase-money, when he is not able to get the whole property for which he contracted. In those cases which are capable of compensation, it performs the contract by inquiring what the diminution in value is from the circumstances which arise upon the investigation of title, and alters the contract so far as not to compel the party to pay the principal money contracted for, but only the principal money deducting the difference between that which he contracted for and that which he can get. With regard to the principal money, there is no doubt as to the practice of the Court. On what principle is it not to deal with interest? The parties agree to pay interest in a certain way; on what terms did they do

(9) 3 Sugden's Vend. and Purch. 118.

that? Upon the condition of the vendors giving a good abstract within a certain time. The purchaser could not be considered as paying his purchase-money before he got his abstract. If, therefore, the vendors are entitled to the interest according to the terms of the contract, why are they not in the same way to make compensation out of the purchase-money for default on their part? I do not think that any such principle as that contended for can be maintained; on the contrary, it would do the greatest possible injustice. Where a purchaser agrees to pay 5*l.* per cent., it is always a great prejudice to him to pay it from an earlier time than that from which he is to have the enjoyment of the property. No property purchased produces 5*l.* per cent.: the payment of the interest is a benefit therefore to the vendor and a loss to the purchaser; and if it arises from the default of the vendor, is the vendor to get the benefit of his own wrong, and to profit by his own breach of contract? And is this Court specifically to perform a contract with all the disadvantages that a vendor imposes upon a purchaser, without giving the purchaser any compensation? I should be very sorry indeed to find the authorities were such as to compel me to follow such a rule. I am happy to say that I do not; although the Master of the Rolls in the last case, *Greenwood v. Churchill*, was evidently hampered by the rule laid down by his predecessor, before whom the point came for decision; yet when the case was argued a second time before him, finding the rule so laid down by his predecessor, though he did not feel that he was at liberty to act upon a rule diametrically opposed to that which was so laid down, he saw the injustice of it; but being bound by *Esdaile v. Stephenson* to compel the party to pay the interest, he left it open to him to apply to the Court for compensation. It does not appear to me at all necessary that I should decide on which ground I think the vendors are not entitled to the 5*l.* per cent. It is a mere question on controverted authorities, which is the true principle, for upon either ground it will come to the same result. It is undoubtedly certain that justice requires that the effect of the rule should not be followed, and it

is very immaterial to distinguish it, as it respects compensation for the amount of interest otherwise payable, or as compensation to be paid to the purchaser by the vendors; that compensation being to be paid out of the very amount of interest which the purchaser, according to the contract, had to pay. None of those cases are directly in point, except that of *Esdaile v. Stephenson*; and I have no doubt that Sir John Leach laid down the rule very distinctly. There are cases where there are very peculiar expressions used; such as, "from any cause whatever," and in others "from any cause whatever, except with the wilful default of the vendor;" but there is not one of them in which the very case occurs which is the subject now for consideration—whether the purchaser is to pay interest notwithstanding that the delay should be occasioned by the act of the vendor; nor has any authority been referred to which would lead to the conclusion as to what would be the result if such a contract were entered into. I have before said it is not very likely it should occur; and one does not very well see why, if a party contracts for performance of the whole, he should not be bound by it; but that cannot be considered as obligatory upon the purchaser, who cannot be supposed to look to delay arising from the non-performance of the very act which the vendor stipulated he would perform. When you speak of "from any cause whatever," you must mean some cause not provided for by the contract. The parties do not consider the probability of either the one or the other breaking the contract; the vendors contracting to do a certain duty on a certain day, and the purchaser contracting on a certain day to found upon that stipulation the condition, which, as between the parties, is the entire contract contracted to be performed by the vendors. However, I do not think it necessary exactly to specify it in the order: it is quite sufficient that I should refer it to the Master to inquire from what time a good title was shewn, and direct the payment of the interest to commence from that time. Of course, the income of the property will be regulated by the same rule.

It was then insisted, on behalf of the

purchaser, that he was entitled to compensation from the vendors for the loss of interest occasioned by the deposit of his purchase-money in the private bank at 2l. 10s. per cent.

The LORD CHANCELLOR was of opinion that the purchaser was not entitled to compensation in that respect, for that the effect of his decision was, that interest did not begin to run against the purchaser until a good title had been shewn by the vendors; the investment of the money, therefore, was a voluntary act on the part of the purchaser, and the loss consequent thereon was not a loss arising from the breach of contract on the part of the vendors, and therefore must be borne by the purchaser. The vendors would be entitled to the rents and profits until a good title was shewn, and interest would run against the purchaser from the same time, and the Master must inquire when that time arose.

V.C. { *In re* THE LANCASHIRE AND
Nov. 16. { YORKSHIRE RAILWAY COM-
 PANY *ex parte* SMITH'S
 ESTATE.

Railway Company—Settled Estates—Investment of Purchase-money—Costs of Incumbrances.

A railway company purchased certain land, which was devised to the petitioner for life, and then to his children. The tenant for life had mortgaged his life estate, and the mortgagees were made parties to the conveyance to the company. The purchase-money was paid into court. The tenant for life now presented a petition for its investment. The mortgagees were served, and asked for their costs:—Held, that such costs must be paid by the mortgagor, and not by the railway company.

This petition stated that certain land at Dewsbury Moor in Yorkshire was devised by George Smith in 1838 to the petitioner, Benjamin Smith, for life, and after his decease to his children as tenants in common. That, in April 1843, the petitioner mortgaged his life estate in the said

land to Messrs. Price, Swain & Gray. That part of the said land had been purchased by the Lancashire and Yorkshire Railway Company for the sum of 420*l*. That the mortgagees were made parties to the conveyance. That the said sum had been paid into court under the powers of the Railway Act. The petition prayed that the said sum of 420*l*. might be invested in the purchase of 3*l*. per cent. consolidated Bank annuities to the account of the said George Smith's devisees, and the dividends thereof paid to the petitioner for life; and that all the costs, charges and expenses attending the investment, and also the costs and charges of this petition, might be paid by the railway company. This petition had been served upon the mortgagees, who now appeared and consented to the prayer of the petition, and asked for their costs.

Mr. M. A. Shee appeared in support of the petition, and contended that the costs of the mortgagees ought to be paid by the railway company. *Atlatt v. Bailey*, decided by Vice Chancellor Knight Bruce, on the 6th of July 1849, was cited as an authority, where his Honour held that a railway company was bound to pay the costs of incumbrancers upon an estate under the 80th section of the Lands Clauses Consolidation Act.

Mr. Bacon appeared for the railway company, and contended that the costs of the mortgagees ought to be paid by the petitioner, the mortgagor.

The VICE CHANCELLOR decided that the costs of the mortgagees must be paid by the mortgagor and not by the railway company.

WIGRAM, V.C.	}	MARSHALL v. SLADDEN.
1849.		
May 26, 28, 29, 30;		
Aug. 10.		

Trust and Trustee—Cestui que trust—Solicitor—Breach of Trust—Costs—Bill, Dismissal of, as against Solicitor, without costs.

Cestuis que trust proposed to pay off a mortgage on the trust property, by raising the necessary funds at less expense and at a lower rate of interest than would be required by another mode of raising the monies pro-

posed by the solicitor of the trustees. The cestuis que trust, without the concurrence of the trustees, carried out their proposal, and pending these transactions one of the trustees of the settlement retired, and in his room a near relative of their solicitor was appointed a trustee, but without any communication on the subject with the cestuis que trust. The trustees afterwards gave notice of their intention to sell the property under a power of sale and exchange, and to defray out of the proceeds their costs, charges, and expenses of negotiating the treaty for the loan which they had proposed to effect. The sale was prevented by injunction, and a bill filed by the cestuis que trust against the trustees and their solicitor:—Held, at the hearing, that the contemplated sale, if carried out, would have been a breach of trust; that, under the circumstances, the trustees ought to be removed and new trustees appointed, but that no costs of suit in respect of such removal or appointment ought to be given, because another suit might be necessary in respect of the transfer and further charge effected by the plaintiffs; and that the bill ought to be dismissed as against the solicitor, without costs.

The judgment of the Vice Chancellor contains a full statement of the facts of the case.

Mr. Rol and *Mr. Goodeve*, for the plaintiffs, contended that the trustees were not justified, under the circumstances of the case, in attempting to exercise the power of sale referred to in the judgment, and that they had been guilty of a breach of trust—*Mortlock v. Buller* (1). With respect to the defendant Sladden, if he, as the solicitor of the trustees, knowingly procured them to commit a breach of trust for his benefit, he must be considered to be a partaker in the breach of trust—*Fyler v. Fyler* (2), *Harvey v. Mount* (3). Although professedly only the agent of the trustees, his conduct in the matters complained of entitled the plaintiffs to make him a defendant—*Attwood v. Small* (4). The costs of the

(1) 10 Ves. 292. Lord Eldon's Observations, pp. 308, 309.

(2) 3 Beav. 550.

(3) 8 Ibid. 439; s. c. 14 Law J. Rep. (n.s.) Chanc. 233.

(4) 6 Cl. & F. 232. Lord Cottenham's Observations, p. 352.

suit were properly asked against him—*Beadles v. Burch* (5), *Le Texier v. the Margravine of Anspach* (6). If the principal should not be solvent the agent would be liable to pay the costs — *Bowles v. Stewart* (7).

Mr. Stinton appeared for the defendant, James Marshall, the present husband of the plaintiff, Louisa Marshall, and in the same interest with the plaintiffs.

The Solicitor General and *Mr. Speed*, for the defendant Sladden, cited—

Keane v. Roberts, 4 Madd. 332.

Adams v. Fisher, 3 Myl. & Cr. 526;
s. c. 7 Law J. Rep. (N.S.) Chanc. 289.

Dove v. Everard, 1 Russ. & M. 231;
s. c. Tam. 376.

Mitford's Pleadings, p. 189, 4th edit.
(Jeremy).

Mr. Kenyon Parker and *Mr. Terrell*, for the trustees.

Mr. Rolt replied, and cited the case of *Sir David Baird v. Baird* (8).

Aug. 10.—WIGRAM, V.C. delivered the following judgment:—The plaintiffs are beneficially interested in an estate called East Studdall Farm, comprised in a deed of settlement, dated the 12th of October 1844, and made on the marriage of the plaintiff, Louisa Marshall, with her first husband, John Maude Smith. This plaintiff was to be and is tenant for life, for her separate use, of the property settled. In execution of powers of this settlement, the estate became subject to a mortgage for securing 5,500*l.* and interest at 4*l.* per cent. per annum; which mortgage, before and at the time of the transfer by Jarvis, the mortgagee, to Wraith, in August 1847, was vested in Jarvis. The original trustees of the settlement were Thornton and the defendant Penny. In the summer of 1846 Thornton retired from the trust, and James Holland was appointed in his stead. On the 27th of January 1847 Jarvis gave notice that the rate of interest must be raised to

(5) 10 Sim. 332; s. c. 9 Law J. Rep. (N.S.) Chanc. 57.

(6) 15 Ves. 159 (164).

(7) 1 Sch. & Lef. 209 (226). *Per* Lord Redesdale.

(8) Bell's Scotch Cases (House of Lords) vol. 6, p. 1. (25-26).

5*l.* per cent. per annum or the mortgage paid off. This notice was (as I understand) formally given both to the plaintiffs and to the trustees of the settlement; but this point, however, is not material. Both had notice of Jarvis's determination, and both, by their solicitors, acted upon it.

Walker, in the transactions that followed, was and acted as solicitor for the plaintiffs, Sankey for Jarvis, and the defendant Sladden (who up to this time had been solicitor for the plaintiffs) for the trustees.

Walker, it appears, had a friend, Wraith, who was willing to advance the 5,500*l.* and such further sum as would cover the costs of the transfer, at 4*l.* per cent. per annum, and to stipulate for a continuance of the loan for five years. Sladden, however, insisted that the trustees were the proper parties to carry out the transaction, and he also, on behalf of the trustees, and under their authority, proceeded to procure the money necessary to pay off Jarvis's mortgage.

By a letter from Holland, the trustee, to Sladden, on the 13th of January 1847, it would appear that Holland was at that time of opinion that a transfer of Jarvis's mortgage at 4*l.* per cent. per annum, and not a sale, was the proper course to be adopted, provided the mortgagee would consent to the mortgage remaining so long as was desired by the mortgagors. I say, a mortgage in preference to a sale; because, from the bill and otherwise, I think it must be collected that the question between a sale and a transfer of the mortgage had been brought forward almost immediately after Jarvis's notice. A triple correspondence took place between the three solicitors, Walker, Sankey, and Sladden; in the result Walker procured the mortgage to be transferred by Jarvis to Wraith, as a security for 5,639*l.* 2*s.* (which was thus made up; 5,500*l.* principal, 46*l.* 4*s.* interest, and 92*l.* 18*s.* costs), and with a stipulation expressed in the deed for the continuance of the mortgage during five years. This transfer was made without the deed being submitted to the trustees, and without their being apprised of the intended addition to the principal debt.

The deed, I understand, was not executed by Wraith; the date of it is the 9th of August 1847. Notice of it appears to have

reached Sladden immediately, for in the same month Sladden, by letter, asks for a copy of the transfer. After this, (on the 4th of September 1847) Holland retires, and the defendant Marsh was appointed a trustee in his stead. This appears to have been done without consulting the plaintiffs or James Marshall, or any one on their behalf. Marsh is a near relative of Sladden. He is, I understand, a trustee of the settlement made upon the second marriage of the plaintiff Louisa Marshall with the defendant James Marshall; but in the matter of that settlement Sladden was the solicitor.

In the mean time, Sladden, professing to act under the direction of the trustees, had treated and agreed with one Williamson to advance a sum exceeding 5,500*l.* at 4*l.* 10*s.* per cent. per annum, for the purpose of paying off Jarvis's mortgage and the costs incurred by the trustees, including the costs and expenses in relation to the treaty and agreement with Williamson. On the 25th of September 1847 Sladden gave notice by letter to Walker that it was the intention of the trustees to sell the estate. The letter is to the following effect:—

“The trustees of the estate, instead of involving themselves in litigation, and instead of incurring further expenses for the purpose of obtaining a transfer from Mr. Wraith by the proceedings mentioned, will endeavour to do the best they can for the estate under the circumstances which now exist, and will proceed under Mr. James Parker's advice to a sale of the estate, under the powers given in the settlement. I wish also to inform you that the trustees have incurred considerable costs and expenses with respect to the advance intended to have been made by Mr. Williamson and his clients, which are chargeable upon and which will be charged by them against the estate; and that rather than incur the expenses or responsibility of raising (in the present state of things) a further sum by way of mortgage, under the power given to them in the settlement, to pay the costs, charges, and expenses they have incurred, they will retain the same out of the purchase-money of the estate. Should the trustees be unsuccessful in effecting a sale, they will then determine upon the propriety of raising a further sum for the purposes mentioned by way of mortgage.”

I have already noticed that Sladden had insisted from the outset that the trustees, and not the plaintiffs, were the proper persons to carry out the transfer of Jarvis's mortgage. The letter of the 25th of September 1847 still insists upon this, and speaks of procuring a conveyance from Wraith, which, it is said, counsel have advised the trustees they have a right to do.

The bill was filed on the 11th of October 1847.

The plaintiffs insist that no costs incurred by the trustees in relation to the treaty and agreement with Williamson ought to be charged upon the trust estate; that the attempt to sell was a breach of trust; that the appointment of Marsh to be a trustee was improper; that Sladden had so acted, by receiving rents and otherwise, as to make himself primarily liable to them as an accounting party, and also liable for the costs of the suit as having concerted with the trustees for his own purposes the sale which it is the object of this suit to prevent. The bill accordingly prays the removal of the present and the appointment of new trustees: that no costs incurred by the trustees in relation to the transfer of Jarvis's mortgage, or in relation to the retirement of Holland or the appointment of Marsh, may be allowed against the estate. It also prays for accounts against the trustees and Sladden, and that they may be ordered to pay the costs of this suit.

The course which the argument took makes it convenient that I should explain my views under two different heads; first, by considering the case as against the trustees only, that is, supposing Sladden not to be a party; secondly, whether Mr. Sladden is properly made a party.

In the argument upon the first of these heads some extreme points were contended for. It was said that the plaintiffs were the proper parties to raise the money for the discharge of Jarvis's mortgage, and that the interference of the trustees was altogether improper. If Jarvis had simply sought to transfer his security to a stranger without the privity of the parties interested as mortgagors, the proposition contended for might have passed without notice, for in that case the position of the parties interested in the estate would not have been

altered by the transfer. But when the trustees received from the mortgagee the notice of January 1847, it became their duty to protect the estate against the possibilities of a sale by the mortgagee or a foreclosure; and this they could only do by seeing that the money required for the discharge of the mortgage was forthcoming. This would be their duty in the simple case of paying off the existing debt. But when, in addition to this, it was intended to increase the debt upon the estate, by adding to it the plaintiffs' costs of carrying out the transaction, and also by converting the interest into principal (a satisfactory explanation of which I have not heard), I can have no hesitation in saying the transaction was one upon which the trustees ought to have been consulted, and that as it now stands it is irregular and improper. Like observations apply to the stipulation for five years. Wraith ought to have been required to execute the deed. It is no answer to this to say that any sum improperly charged upon the estate may be struck off, or that Wraith, by accepting benefits under the deed, is bound by such of its provisions as impose duties upon him. Matters such as these are not to be left to future litigation. The estate should be protected by proper deeds, and the office of trustees is to take care that it is so protected. If the controversy between Sladden and Walker had been directed and confined to the points above noticed I should have had comparatively little difficulty in dealing with this case. But this is not the simple case with which I have to deal. I agree with the plaintiffs' counsel that the principal point to be tried in this case is, whether the sale, which it is an object of this suit to prevent, was or not a justification on the part of the trustees, and I must consider the bill as filed for the purpose (in part, at least) of preventing the intended sale. With reference to this three points arise. First, are the costs incurred in relation to Jarvis's mortgage properly chargeable on the trust estate? Secondly, if so, were the trustees justified in raising them by sale? Thirdly, can the sale be justified under the power of sale and exchange contained in the settlement of October 1844? In noticing these points I will begin by supposing Wraith's mortgage free from objection.

First, with respect to the costs incurred in relation to Jarvis's mortgage. For the reasons already mentioned I think the trustees are *prima facie* entitled to the costs. The question is, whether (being so entitled in the first instance) they were justified in putting the estate to expense in their endeavours to raise money after they had notice that the plaintiffs had the money at command upon the terms proposed by Wraith. That notice would have justified them in requiring that Wraith should bind himself to advance the money when required. But I am satisfied that I ought not to charge the estate with any costs occasioned by their treaty and agreement with Williamson after the trustees had notice of Wraith's offer, or such notice as ought to have put persons acting in the execution of trusts upon inquiry. So far, therefore, as the sale had for its object the payment of costs incurred after such notice, I think the purpose of the sale was not legitimate.

The view which I take of this case makes it unnecessary that I should consider the second and third points apart from each other. The settlement of October 1844 empowers the trustees to raise money by mortgage for the purpose of paying costs. But after repeated consideration of the power of sale and exchange contained in the settlement, and comparing the clause with common precedents of powers of sale and exchange, I am satisfied that the parties to that settlement contemplated the possibility of its becoming expedient to sell the estate without reference to any contemplated exchange, and that they intended, as in terms they have done, to arm the trustees with a power for that purpose. I may observe, with reference to what Lord Eldon said in the case of *Mortlock v. Buller*, that he does not lay it down as an absolute proposition, that, under the ordinary power of sale and exchange, trustees can in no case sell except with a view to a contemplated exchange. He says only that a very special case must exist to justify such a course. But whether I am right or not in my construction of the clause in question, it is clear that the trustees cannot justify the sale which it is the object of this suit to prevent, unless the sale was determined upon as the course most for the benefit of the plaintiffs, irre-

spective of the controversy between Walker and Sladden. Now, giving the trustees credit for having intended to speak the truth in their answers in this cause, I cannot, upon the evidence before me, hesitate in coming to the conclusion that the trustees put themselves into the hands of Sladden to an extent which has deprived the plaintiffs of the benefit of that independent judgment on the part of the trustees to which they were entitled, and that the sale which it is the object of this suit to prevent was resorted to by Sladden as the means of carrying the controversy between himself and Walker to a successful result on the part of the former. And inasmuch as part, at least, of the costs for which it was intended to provide by the sale is not, in my opinion, properly chargeable upon the estate, I think the sale, if completed, would have involved to some extent a breach of trust, and that the suit has been occasioned, in part, by conduct for which the trustees are responsible, and of which the plaintiffs have a right to complain. The precise day on which the trustees had notice of Wraith's offer I need not determine. I am quite clear it must be ascribed to a very early date in the transactions.

With respect to the retirement of Holland and the appointment of Marsh, I have no hesitation in saying that the appointment of Marsh, without communication with the plaintiffs, was improper. Admitting that the mere letter of the settlement of October 1844 would justify the appointment, still, in the circumstances of the case, it was improper. The trustees must have known that the plaintiffs would, and with just reason, have opposed such an appointment. It was made obviously at Sladden's instance, in order to keep the trust more completely under his dominion. This is not the course which trustees ought to pursue, and I must consider that the trustees are responsible for the acts of Sladden. I must, in fact, consider his acts as their acts.

Upon the assumption that Wraith's mortgage is free from objection, it would follow that the trustees have been altogether in the wrong in what has been done by Sladden on their behalf since they had notice of Wraith's mortgage. But this difficulty arises: Wraith's mortgage is not free from objection, and the plaintiffs have

not the benefit of the argument against the trustees that in Wraith's offer, of which the trustees had notice, a transaction was contemplated which was in strict accordance with the trusts. Indeed the trustees might with some appearance of reason contend that they were altogether justified in disregarding a notice which had terminated in a breach of trust. But this, I think, would be too lenient, as it would be a very technical view of the case. Had the trustees, as I think they ought to have done, communicated with Walker as soon as they had notice of Wraith's offer, it is impossible to doubt that the objections to Wraith's mortgage (which is very trifling in amount) would have been obviated. Sladden's motive for not doing so cannot be mistaken. And if in this suit I could correct that which is wrong in Wraith's mortgage, I should have no doubt as to the proper order to be made. In that case the plaintiffs would have had to repair in this suit a breach of trust to which they were parties, as well as that of which they complain, and I should have repaired both breaches, giving no costs of this part of the suit. I think I ought not to make any difference upon the point of costs, because another suit may be necessary in respect of Wraith's mortgage (in whose absence I cannot clear the trust estate) unless the parties have the good sense to set the matter right without suit.

Upon the whole, I think the proper decree to be made upon this part of the case is to remove the trustees and appoint new ones, without prejudice to the rights of any of the parties to complain of Wraith's mortgage, and in this suit to give no costs so far as the suit is addressed to the purpose of removing the trustees.

With respect to the accounts. In the absence of Holland, and in accordance with the arrangement made at the hearing, the decree for the account must not be carried back further than the retirement of Holland, *i. e.* (as I understand) the 4th of September 1847. There is nothing in the mere absence of Holland to prevent my saying, if upon the merits it would be right to say, that the plaintiffs have a right to require that neither Penny nor Marsh shall continue trustees.

Next, as to Sladden being a party. I incline strongly to the opinion that the

counsel who drew this bill had not in his mind the cases in which it has been holden that solicitors concerned in the perpetration of a fraud may, upon a bill filed to be relieved against such fraud, be made parties to it, and costs prayed against them as matters of relief. I think the case intended to be made against Sladden was confined to this, that he had made himself directly liable to account to the plaintiffs as a trustee. Upon this point I retain the opinion I expressed at the hearing. Sladden swears that he acted as agent of the trustees in all his receipts and payments of the trust property. This is in accordance with the presumption to which the facts of the case, *prima facie*, give rise. The onus is upon the plaintiffs to prove the contrary, and they have not done this. If, however, I am to consider the bill as seeking to charge Sladden with costs, upon the ground that he was an accomplice with the trustees in the wrong of which the bill complains, my conclusion is against the plaintiffs' right to a decree in that respect. The practice which in certain cases entitles a party to make a mere agent a defendant to a suit, and pray costs against him, is certainly a practice of a very anomalous character, and is open to all the objections pointed out by the Lord Chancellor (Cottenham) in *Attwood v. Small*. If the Court had determined that every one who assisted another in committing a wrong should be answerable for the injury sustained by the party aggrieved, the practice would not be open to some of the observations which apply to it in its existing state; but that is not the state of the case. The agent is not liable for the injury committed, but is only a surety for the costs incurred in redressing the wrong. The question is, whether the present case falls under the practice. After what has fallen from the Lord Chancellor, I may with confidence assume that the practice will not be extended to any cases to which it has not already been actually applied. And the question is, how those cases can be defined? Lord Redesdale in his *Treatise on Pleadings*, appears to refer the origin of the practice to the case of an arbitrator making a corrupt award. Such cases are very peculiar. The arbitrator is himself, in fact, the wrong-doer. In cases of fraud, properly so called, the like observa-

tion correctly applies. If the agent actually misleads the party aggrieved by a *suggestio falsi* or a *suppressio veri* (which he is under an obligation to disclose), he also himself does the specific wrong of which the party complains, as in the case of the arbitrator; and if the practice be confined to such cases, the practice, however anomalous, is limited in its application. Lord Redesdale's observations, upon a fair construction of them, appear to me to confine the practice to cases of fraud, and as far as my researches have gone, the Court has never made a decree against a mere agent under this practice except upon the ground of fraud. I asked counsel during the argument whether any case could be found in which the Court had made such a decree except upon the ground of fraud. No such case was produced; but some late cases were referred to, in which, from the language of the judgments, it would certainly appear that the Master of the Rolls may have thought, although he did not so decide, that a solicitor who, by his advice and agency, helped his client to commit a wrong, was within the practice although not actually a party to any fraudulent misrepresentation or concealment, and although no communication may have taken place between him and the party aggrieved. The observations of the Master of the Rolls are entitled to the greatest weight, but I cannot bring myself to think the present case is within the practice. In one sense, indeed, Sladden may be considered chargeable with fraud, for every wilful act by which a wrong is committed may in a moral point of view be so considered. But there is nothing of false suggestion, or improper concealment, or undue influence, or other fraud in its technical sense, or any fraud except in the general sense above adverted to, with which Sladden is chargeable. The conduct of the trustees under his advice or his conduct (whichever way I am to consider it) has been openly and avowedly adverse to Walker and his clients. I cannot think that such a case is within the anomalous practice I am considering. Stopping here, I think the bill should be dismissed as against Sladden; but advertng to the cases at the Rolls, and to my own difficulties, and to Sladden's conduct in the transactions which are the subject of this

think I am not violating the rule
 lly acted upon by the Lord Chan-
 of throwing the costs of a suit on the
 essful party, by dismissing the bill
 Sladden without costs. It was
 however, in argument, that as the
 ffs had sought relief against Sladden
 he specific ground of fraud and failed
 in such relief, Sladden was entitled
 costs under a settled rule which was
 acted upon in *Lady Wilde's case* (9)
 House of Lords. I do not think the
 case is within the rule. It is not
 ere use of the word "fraud" in the
 ngs that will bring a case within its
 ion. Where acts are charged against
 r which in themselves are fraudulent,
 ourt, upon the question of costs,
 considers the bill as imputing fraud,
 gh the word "fraud" may not be
 n the bill. Lord Cottenham made
 mark in *Pickering v. Pickering* (10)
 r hearing as counsel; and I have
 held that the mere use of the word
 l" in the pleadings ought not to
 the question of costs where the case
 is not one of fraud in the proper
 of the term, and the word "fraud" is
 used in the vague and general sense I
 referred to, which appears to me to
 case in the present bill.
 decree which I make is as follows :
 miss the bill, without costs, as against
 n. Remove the trustees, and refer it
 Master to appoint new trustees. No
 of the suit, so far as it seeks the
 al of the trustees and the appointment
 w ones. Account of the trust pro-
 ; such account by consent not to
 ried back further than the retirement
 land. Reserve further directions and
 of suit, except those above provided
 The decree to be without prejudice to
 ght of any of the parties interested to
 ain of Wraith's mortgage in any other
 r proceeding.

S. c. nom. *Gibson v. D'Este*, stated in Sir
 d Sugden's Treatise on the Law of Real Prop.
 p. 614.

4 M. & C. 289; s. c. 8 Law J. Rep. (N.S.)
 336.

L.C. }
 1849. } COLE v. SCOTT.
 Nov. 29. }

Will—Statute 1 Vict. c. 26. s. 24.—
After-acquired Property.

*A testator devised the residue of his estates
 "whereof I am now seised" to trustees upon
 certain trusts, and afterwards devised "all
 such trust estates, freehold, copyhold and
 leasehold, as are now vested in me, or
 as to the leasehold premises as shall be
 vested in me at the time of my death":—
 Held, (affirming the decision of the Court
 below) that the testator had himself put a
 construction upon the word "now"; and
 that property contracted to be purchased by
 him after the date of his will did not pass
 by it.*

The will of John Cole upon which the
 question in this case arose, and the construc-
 tion put upon it by the Vice Chancellor of
 England, will be found reported in 17 *Law
 J. Rep.* (N.S.) Chanc. 423. The first de-
 vise contained in the will was a devise of
 the "messuage, &c. wherein I now reside."

The defendants appealed from that deci-
 sion.

Mr. Bacon and *Mr. Malins* appeared for
 the appellants.

Mr. Roll, *Mr. Campbell* and *Mr. Moore*
 appeared for the plaintiff.

THE LORD CHANCELLOR.—In questions
 of this sort, which are very likely to occur
 and to be matter of discussion in all the
 different courts, it is certainly very import-
 ant, if there is really a debateable case to be
 considered, to adopt a course that should
 create a uniformity of decision upon them :
 but then I think it must be a debateable
 matter. I cannot send to a court of law a
 question on which I conceive there is no
 doubt : and although I should be unwilling
 to act on the impression of there being no
 doubt on a purely legal question, if nothing
 else had taken place, yet where the parties
 have had the good sense, I think, to depart
 from the ordinary course of proceedings in
 a court of equity, which is, to send a merely
 legal question to courts of law, and have
 asked to take the opinion of a court of

equity in the first instance, I cannot permit them to depart from that in that way. Before the decision took place, they were very willing to take the decision of the Court, but when the opinion of that Court which they have selected is against them, they take a very different view and wish to take their chance of another discussion. That is not what I call a subject-matter of appeal, because the Court below has never exercised any discretion upon that. If the Vice Chancellor had said, "No, I will decide it on my own authority, and will not send it to law," there might have been a ground of complaint. That is not so. The Vice Chancellor was aware of the usual course as to the expediency of applying to a court of law, not on account of any doubt or difficulty which he felt, but because it was a purely legal question. Then the parties agree that they are desirous of having his opinion on the case as it stands, and he very properly indulged them with that, and he gave them his opinion. Then it comes before me, the appellants disputing the decision of the Vice Chancellor and asking for a contrary decision on the construction of the will. It is quite competent for them to do that; but when I express my opinion that according to the view I take of it, the Vice Chancellor is right, I do not think it is competent to them to say, "Now adopt that course which we repudiated below, and give us a third chance before another Court." I think there is no doubt that the course taken below was a judicious and proper course. The question is, what effect that ought to have on the case now before me. But since this has been more fully investigated, it appears to me so free from doubt that, under any circumstances, I should be very reluctant at all events to expose the parties to further litigation upon it.

The statute being that the rule shall prevail, "unless a contrary intention shall appear by the will," it is not necessary at all to find a contrary intention expressed in so many words, or in something free from doubt. I find on the fair construction of the will, adopting those rules in that construction which are usually adopted in construing wills, that the contrary intention does appear. The result, therefore, of such an opinion on such a construction of the

will, will inevitably lead to taking the case out of that section of the act.

Now, I have not any doubt whatever on this will what was the testator's intention. Whether it arose from not having present to his mind when he made the will, the provisions of the statute, or for what other reason, it is quite immaterial to consider. The question is, whether in the terms he has used he has not used the word "now" with reference to the time he was making his will. I think it quite clear he has. I find a will with a date to it, shewing the period when it was executed, and I find that he gives "all the estates of which I am *now* seised or possessed." "Now" has no meaning in itself. If there is no date to construe the word "now," you must ascertain something to which it can refer, where the date of the execution does not appear; but here the date does appear, and the word "now" can only have reference to the time specified in the will. The time specified in the will is the date of it, namely, the 29th of April 1843. It appears to me just the same as if he had said, "all the freehold and leasehold estates of which I am, on this 29th of April 1843, seised and entitled to." If those had been the words, of course there could not have been a doubt. Are they not the same words? What is the difference, whether he repeats the date or whether the word "now" shews he refers to the date?

That is one view of it, that is merely referring to the very words to be found in this particular clause. But he does not stop there, for he uses the word "now" in two other parts of the will, in each of which he evidently and clearly alludes not to the time it may come into operation by his death, but he alludes to the particular period at which he is making his will. Am I, then, in taking a fair view of the expressions used in order to see what he intended, and in trying to put a fair construction on the word "now," which you find in the particular clause, to disregard the same word used with reference to other gifts in other parts of the will? It would be departing from the ordinary rule of construction to do so. It appears to me beyond all doubt and question, that in using the word "now" he meant the day on which he made his

will, and no other period. Then it comes within the act. The act says, if the contrary intention appears, the provision is not to apply. I am of opinion here the contrary intention does appear.

With reference to the question of personality, to which Mr. Rolt has referred, it is as clear as can be. The act in effect puts the case of real and personal property on the same footing; and though wills of personality merely, as a general rule, speak from the day of the death and not from the state of the property at the time of making the will, yet if there are expressions in the will shewing it was intended to describe property with reference to the day of the date of the will, and not the day of the death, then the intention would prevail. It prevails undoubtedly in cases of personality, and by this act it is the same as real estate.

For these reasons I am of opinion upon the construction of the will, and also from what passed in the Court below, that there is no case here which would authorize me, or justify me, in sending a case for the opinion of a court of law. I must, therefore, dismiss the petition of appeal, with costs.

WIGRAM, V.C. }
Dec. 8, 10. } CURTIS v. FULBROOK.

Power of Sale—Donees implied—Executors.

A testator devised, in 1835, all his real estate to his wife for life, with remainder as to part to two joint tenants for life, and directed the same to be sold on the death of the survivor. He bequeathed the monies arising from the sale to such individuals of a certain class as should be then living, and appointed his wife and others executrix and executors. The will contained no power other than the direction to sell, nor was any donee named:—Held, that the power of sale was vested, by implication, in the surviving executors.

This was a suit by legatees against the executors and the heir-at-law of a testator, and others. The bill stated that the testator, in the pleadings mentioned, by his

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will, executed before the passing of the new Will Act, gave all his real and personal estate to his wife for life, and after her decease (except as to certain specific devises and bequests) to John Davis and Mary Protherow and the survivor of them for life, and directed that immediately after their decease certain copyhold hereditaments (part of the devised estate) should be sold by public auction; that he gave and bequeathed the monies arising from such sale amongst the children of James and Mary Curtis, the children of William Cooper and his then late wife Mary, and the children of Edward and Mary Walker, share and share alike, and to such of them as should be living at the death of John Davis and Mary Protherow; and that he appointed his wife, the defendants Fulbrook and Cooke, and one W.T. Baker (who never acted), executrix and executors of his will. The testator died at the end of the year 1835, his widow at the beginning of the year 1845, and the survivor of the tenants for life some time in the year 1846. The executors entered into possession on the death of the latter, and demanded payment of the rents of the copyhold hereditaments, but it did not appear that the tenants had paid the same to them. The bill was filed in January 1848. It charged, *inter alia*, that the executors had been guilty of misconduct in not selling the copyholds, and prayed for a sale, an account, and a receiver.

At the hearing of the cause, an objection was taken that the executors were not necessary parties to the suit.

Mr. Kenyon Parker and Mr. Winstanley, for the plaintiffs, argued that as the executors were the persons to distribute the proceeds of sale, they were the implied donees of the power of sale, and cited *Blatch v. Wilder* (1), *Tylden v. Hyde* (2), *Shaw v. Borrer* (3), *Page v. Adam* (4), *Forbes v. Peacock* (5). They also con-

(1) 1 Atk. 420.

(2) 2 Sim. & S. 238.

(3) 1 Keen, 559; s.c. 5 Law J. Rep. (N.S.) Chanc. 364.

(4) 4 Beav. 269; s.c. 10 Law J. Rep. (N.S.) Chanc. 407.

(5) 11 Sim. 152; s.c. 12 Ibid. 528; 9 Law J. Rep. (N.S.) Chanc. 367; 13 Ibid. 46; 11 Mee. & W. 630; 12 Law J. Rep. (N.S.) Exch. 460.

tended, that if the executors were not strictly necessary parties, they had deprived themselves of the privilege of being dismissed by their conduct in and previous to the commencement of the suit.

The Solicitor General and *Mr. Selwyn*, for the defendant *Fulbrook*, contended that the power was not given by implication to the executors — *Bentham v. Wiltshire* (6). In the present case the copyholds were specifically devised, and had become severed from the general estate. All the debts of the testator had been long since paid, and it was not pretended that the executors required the proceeds of the sale of this property to satisfy either debts or legacies.

Mr. Wood and *Mr. Smythe* appeared for the other acting executor.

Mr. Bacon and *Mr. Twells*, for the heir-at-law; and

Mr. Shapter for the other defendants in the same interest with the plaintiffs.

Mr. Kenyon Parker replied.

Dec. 10.—*WIGRAM, V.C.*—If I considered myself at liberty to act upon my own opinion, I should be inclined to follow the decision of Sir John Leach, in *Bentham v. Wiltshire*. I must say it appears to me that in a devise to a person for life, with a direction to sell at his death, and to distribute the proceeds, the direction to sell is merely for the convenience of division. But the Vice Chancellor of England disapproves of the case of *Bentham v. Wiltshire*, and is reported to have said, in *Forbes v. Peacock* (7), he did not think that Sir John Leach would have so decided it if he had known Sir William Grant's decision in *Ward v. Devon* (8). I am, therefore, bound by the earlier decisions, and must hold that the executors have in this case a power of sale by implication, and, consequently, that they were properly made parties to this suit.

(6) 4 Madd. 44.

(7) 12 Sim. 536.

(8) Stated in the report of *Forbes v. Peacock*, 11 Sim. 160.

M.R. }
Dec. 21. } KNIGHT v. BOUGHTON.

Will—Tenant for Life—Rents—Appportionment to Day of Death—4 & 5 Will. 4. c. 22.

*A testator gave freehold, copyhold, and leasehold estates to a trustee upon trust to maintain his mansion-house, and pay various expenses, and for that purpose to expend annually not exceeding 600*l.*, and permit his wife to reside therein, &c., and after some other deductions, to pay five-eighth parts of the net rents of his estates unto his wife for her own use during her life, and the other three-eighths to his daughters. The wife received her portion of the net rents up to Lady day 1847, and died on the 24th of July 1847. The personal representatives under her will, by a petition in the cause, claimed a proportionate part of the rents from the last payment up to and including the day of her decease:—Held, that the tenant for life was not affected by the payments of the rents, as they were payable to the trustee: that a right of the trustee to pay arose with his receipt: that the right of the wife to receive accrued under the will: that there was nothing to prevent the payments being made at fixed periods; and that the personal representatives were entitled to a proportionate part of the rents up to and including the day of the death of the wife.*

This was the petition of John Arkwright and Frances Stackhouse Acton, as the personal representatives of Francis Knight, deceased, asking, under the 4 & 5 Will. 4. c. 22, for a proportionate part of the sum of 4,329*l.* 6*s.* 3*d.*, which had accrued due between the last payment and the day of the decease of Frances Knight, in respect of rents of divers estates, of which she was tenant for life.

Thomas Andrew Knight, by his will, dated the 5th of February 1836, after mentioning the will of his brother Richard Payne Knight, under which, in addition to his own, he was entitled to divers freehold, copyhold and leasehold estates, proceeded in the following words:—"I give, devise and bequeath unto Sir William Edward Rouse Boughton, his executors,

administrators and assigns, all my freehold, copyhold and leasehold estates whatsoever and wheresoever situate, comprising as well those which were my late brother's as my own, excepting two messuages, with their appurtenances, the one situate in Greek Street, Soho, and the other in Soho Square, in trust that he, the said Sir W. E. R. Boughton, his heirs, executors, administrators and assigns, do and shall keep my mansion-house at Downton Castle, and the offices, outbuildings, gardens and pleasure grounds thereto belonging in proper and sufficient order and repair, and shall also pay the window tax, and all other taxes which shall from time to time be charged upon and become due therefrom, and that for those purposes he may expend annually out of the rents of the estates, late of my said brother, any sum not exceeding 600*l.*, and also do and shall permit and suffer my wife Frances Knight to reside in, and have the use and enjoyment of my said mansion-house, books, pictures and utensils of all sorts in and about the same, and the offices, outbuildings, gardens and pleasure grounds during her life, if she shall choose to make the same her residence, together with 100 acres of land surrounding my mansion-house, which she may choose, and that without paying any rent for the same; and also do and shall, after deducting out of the rents of the estates, late of my said brother, all payments which may from time to time be made by him and them for taxes, repairs and improvements, salaries of receivers, bailiffs and workmen, employed in the management of the same estates, and my own estates, or otherwise relating thereto, the fines and fees for admission to the copyhold parts thereof, and the renewals of the leases of the leasehold parts thereof, and other necessary outgoings, pay five eighth parts of the net rents of the said freehold, copyhold and leasehold estates so devised to him and them as aforesaid unto my wife Frances Knight, *for her own use during her life*; one eighth part thereof to my daughter Frances, now the widow of T. P. S. Acton, deceased, during her life; one other eighth part thereof, by equal half-yearly payments, to my daughter Elizabeth, now the wife of Francis Walpole, during her life, for her sole and sepa-

rate use," &c., "and the remaining one-eighth part thereof I direct shall be retained and taken by the said Sir W. E. R. Boughton, for his own use during his life, and after his decease shall be paid to my daughter Charlotte his wife, [since deceased,] in case she shall survive him, during the term of her natural life: and as and when my said wife and daughters Frances Stackhouse and Elizabeth Walpole shall severally depart this life, I will and direct that their respective shares of and in such net rents of the said freehold, copyhold and leasehold estates shall be retained and taken by the said Sir W. E. R. Boughton and Charlotte his wife, during their lives and the life of the longer liver of them:" and after the decease of the survivor, the said testator gave the several estates to such son of Sir W. E. R. Boughton and Charlotte his wife as they or the survivor of them should appoint, and, in default of appointment, to their second son A. J. Boughton, his heirs, executors, administrators and assigns; and the said testator appointed Sir W. E. R. Boughton sole executor of his will.

The testator died on the 11th of May 1838, leaving his widow and three daughters, his co-heiresses-at-law, surviving, and on the 16th of October 1838, Sir W. E. R. Boughton proved his will.

On the 16th of October 1838 a suit was instituted to carry into effect the trusts of the will of the said testator, and under an order dated the 24th of November 1838 a receiver was appointed.

On the 24th of July 1847, Frances Knight, the widow of Thomas Andrew Knight, died, having by her will, dated the 3rd of July 1844, and a codicil thereto, appointed John Arkwright and Frances Stackhouse Acton her executors, who duly proved the same, and as her personal representatives claimed a proportionate part of the balance of the receiver's account, amounting to 4,329*l.* 6*s.* 3*d.* from Lady-day 1847 to Lady-day 1848, in respect of the life interest of Frances Knight, and accordingly it was paid into the Bank.

Mr. Turner and Mr. Humphrys, for the petitioners. — The question is, whether the widow of the testator was entitled to an apportionment of the rents coming due at the time of her decease; if not, then a question would arise upon the leases, whether

as the direction in the will was to pay at fixed periods, she was entitled to an apportionment of the rents on leases executed before the passing of the 4 & 5 Will. 4. c. 22, and whether she was also entitled to an apportionment of rent upon demises by parol. Upon this latter point the question had been raised—*In re Markby* (1), and it was held that the act did not apply to rents payable by tenants from year to year, which had not been reserved by an instrument in writing. Should these be decided in the negative, then the question will be, whether as she was entitled to an apportionment of the rents received upon leases executed after the act, the petitioners are not also entitled to a general inquiry respecting the whole.

Mr. Bailly, for *Mrs. Walpole*.—The act of parliament applied to the instrument giving the right to receive, and not to the instrument creating the obligation to pay. At common law no rent-charge could be apportioned, but it was named in the act, and so was a *modus*. Dividends on Bank annuities are not payable by deeds, but by acts of parliament; the 4 & 5 Will. 4. c. 22. therefore referred to the instrument creating the right to receive, which in this case was the will of the testator. The question here, therefore, is not touched by the case of *In re Markby*; and in *Browne v. Amyot* (2) it was held that the act applied only to those cases where the death of the person interested in any such rents, or the death of the person for whose life the estate was held, caused the determination of the interest of such person. In this case, that which was to be received by the tenant for life was a periodical payment. Suppose there was a letting at the rent of 800*l.* a year, the right of the trustee to receive was identical with the liability to pay; the right, therefore, of *Mrs. Knight* to receive was identical with the right of the trustee to receive; and the mere circumstance that the tenant had not paid, could not vary the rights of the parties, for assuming the tenants had been in arrear still *Mrs. Knight* would be entitled to receive.

Mr. Walpole and *Mr. Follett*, for Sir

(1) 4 Myl. & Cr. 484.

(2) 3 Hare, 173; s. c. 13 Law J. Rep. (N.S.) Chanc. 232.

W. E. R. Boughton.—The rents were not within the terms of the 4 & 5 Will. 4. c. 22, as the instruments fixing the payments were executed before the act passed. If the periods of payment were fixed, they were not within the provisions of the act, because payment must be fixed by the instrument under which the party had a right to claim from the party to pay. The only claim that could be made must be upon the leases executed after the act—*In re Markby*. It was the instrument which gave the right to receive that ought to fix the periods of payment, and those periods ought to be fixed by an instrument executed after the passing of the act; consequently, as the periods were not fixed by the will, the party never became entitled under the act of parliament.

Mr. Turner, in reply.

The MASTER OF THE ROLLS.—It is admitted that *Frances Knight* was entitled to five eighths of the rents up to Lady-day 1847, and this petition is presented by her legal personal representatives claiming under the 4 & 5 Will. 4. c. 22, a further portion of the rents up to and including the day of her decease. The will of *Thomas A. Knight* was made in 1836, and the act passed in 1834, so that it is clear the wife was entitled by virtue of the will, which came into operation after the date of the act. The will gave her five eighths of the net rents, but it did not state the time at which they became due. The rents became payable at periods which the petitioners say ought to be considered as fixed with reference to this will, as they were to be made at fixed periods, but the rents arose in part from leases, and the donee for life was not to have anything to do with payments made to other persons. She had a right to a share of the rents, which were payable to her by trustees, and no sooner did they receive than the right to pay arose. It is then said, that the act related to payments coming due at fixed periods, and that it applied only when the payments were fixed by the nature of the contract; but in this case the right to receive accrued under the will, and it had not been explained why the payments could not be made at fixed and stated periods. I am of opinion, that the petitioners are entitled to a share of the rents up to and

including the day of the death of Frances Knight.

[See *Michell v. Michell*, 4 Beav. 549.]

M.R. }
Dec. 21. } DOUGLAS v. ANDREWS.

Infants — Maintenance — Ability of Mother to maintain and educate—Inquiry.

Upon a petition, on behalf of infants who had lost their father, for an allowance by way of maintenance, an inquiry to ascertain whether the mother was of sufficient ability to maintain and educate them was refused, as being contrary to established rules.

This petition was presented, on behalf of infants, by their next friends, asking for a reference to the Master to ascertain their ages, and the nature and amount of their fortunes respectively, and also to inquire whether their mother was of sufficient ability to maintain and educate them, regard being had to their rank in life, and their present fortunes and expectations, and if not, to ascertain what would be fit and proper to be allowed, and to whom, for the maintenance and education of the petitioners during their minorities respectively, and from what past time, since the death of their father, such allowance should commence, and out of what funds such allowance should be taken. It appeared that the father of the petitioners died on the 1st of November 1843, leaving a widow and three children, the petitioners, surviving. After their father's decease the children, who were now of the respective ages of twelve, nine, and seven years, continued to reside with their mother, and had been maintained and educated by and at her expense, and when not at school they still resided with and were wholly maintained by her.

Mr. Turner and Mr. Busk, for the petitioners.—The mother might be of sufficient ability to maintain and educate the children, independent of any allowance from their fortunes. It would therefore be necessary to have an inquiry to ascertain this fact, before any maintenance could be allowed, and they referred to *Chambers on Infancy*, 14.

Mr. Roupell, on behalf of the mother of the children, said there was no authority for directing any such inquiry.

The MASTER OF THE ROLLS.—Without an express authority, I will not make an order contrary to the established rules: with the exception, therefore, of the reference as to the ability of the mother to maintain and educate the children, I shall make the order asked by the petition.

[See *Billingsly v. Critchet*, 1 Bro. C.C. 268, and *Haley v. Bannister*, 4 Madd. 275.]

L.C. }
Nov. 7, 8, 10. } *In re THE NORTH OF ENGLAND JOINT-STOCK BANKING COMPANY (Hall's case).*

Company—Joint-Stock Companies Winding-up Act — Contributory — Trustee of Shares.

A, in right of her deceased husband, was entitled to six shares in a joint-stock banking company, and on her second marriage she assigned by deed all her interest in these shares to B, in trust for her separate use. B. gave verbal notice to a clerk of the company of the execution of the deed, but no transfer of the shares was ever required by or made to him. B, for some years, received the dividends and signed the dividend warrants as "agent of A." A memorandum of the assignment was made in the books of the company without the privity of B; but his name was never returned to the Stamp Office as a shareholder until the stoppage of the bank:—Held, reversing the decision of the Court below, that the facts in evidence did not authorize the Master to place B. on the list of contributories within the Joint-Stock Companies Winding-up Act; but leave was given to try the question of B's liability in an action at law.

Andrew Outerston, at the time of his death, was the owner of six shares in the North of England Joint-Stock Banking Company. By his will he appointed his wife, Elizabeth Outerston, his executrix and residuary legatee. John Hall received

the dividends on these shares as agent for Mrs. Outerston, who, in 1842, intermarried with Mr. Taylor, having previously to that marriage assigned these six shares to Hall, as trustee, for her separate use; and in the books of the company there was an entry made of the fact of such assignment in these words:—"J. Hall, of, &c. is appointed trustee by deed, and is invested with absolute power over them," but there was no evidence to shew by whom or at what time such entry was made. The dividends were received by Hall and the dividend warrants signed by him, sometimes "For the executors of A. Outerston," sometimes "*Per pro.* Elizabeth Outerston," and at other times "For the trustees of Mrs. A. Outerston and self." The shares were never transferred to Hall nor was his name returned to the Stamp Office as a shareholder. The bank stopped payment, and an order being made for the winding up of the affairs of the company, the Master included the name of Hall in the list of contributories. On the 18th of July, Hall moved that his name might be struck out of the list. The Vice Chancellor Knight Bruce held that, though the formalities prescribed for the transfer of shares had not been complied with, yet Hall must be held to be a contributory; but that he was entitled to be described on the list as liable only for losses incurred since the 23rd of March 1842, the date of the assignment to him. Two notices of motion were then given for a rehearing by way of appeal before the Lord Chancellor, the one, that Hall's name might be struck out of the list of contributories, and the other, that the qualifications as to his liability might be struck out.

By the 28th clause of the company's deed of settlement it was provided that the husband of any female shareholder, or the executor, administrator or legatee of any deceased shareholder should not be a member of the company in respect of such shares as should be vested in him in any of the capacities aforesaid respectively; but he should be at liberty either to sell and dispose of such shares, or, at his option, to become a member of the company in respect thereof upon complying with the provisions thereafter expressed in that behalf. The 29th clause provided that any such husband, executor, administrator or

legatee as aforesaid who should be desirous of becoming a member in respect of such shares should give notice of such his desire at the office of the company; whereupon, and upon complying with the provisions of the deed of settlement, he should be admitted a member in respect of such shares and have the same transferred to him accordingly, and should be personally charged with the duties and liabilities incident to the ownership of the same. By the 30th clause it was provided that any such husband, executor, administrator or legatee, who should not, under the 29th clause, elect to become a member of the company in respect of such shares, should be entitled to all dividends due at the time his title accrued, but that the future dividends should remain in suspense till the completion of the transfer thereof. By the 32nd clause it was provided that every person to whom shares should be transferred and who should not then be a member of the company, and every person who, being the husband of any female shareholder, or the executor, administrator or legatee of any deceased shareholder, should by notice in writing as aforesaid signify his desire to become a member of the company, should, as to all duties, obligations, claims and demands upon or against him in respect of such shares, be considered a member of the company from the time of the shares being so transferred to or so becoming vested in him as aforesaid; but as to all profits, rights, privileges and advantages to arise from the same shares, no such person should be considered as a member in respect thereof until he should have executed the deed of settlement.

Mr. Malins and *Mr. Hallett*, in support of the motion.—John Hall, as well after as before the assignment to him, acted merely as the agent of the executrix, receiving the dividends under a power of attorney. He had no legal title, and the shares had never been transferred to him; nor had he given notice to the company of his desire to become a member so as to make him liable under the 32nd clause of the deed. The executrix had never divested herself of her legal liabilities; *Ex parte Morgan in re the Vale of Neath Brewery Company* (1).

(1) 1 Hall & Twells, 320; s. c. 1 Mac. & Gor. 225; 18 Law J. Rep. (N.S.) Chanc. 265.

The directors never returned Hall's name to the Stamp Office as owner of these shares until the stoppage of the bank. The memorandum in the company's books that Hall was the assignee, cannot make him liable, as that was made without his authority. *In re The St. George's Steam Packet Company (Pim's second case)* (2).

Mr. Bacon and Mr. Headlam, contra.—The deed of assignment was noticed in the books of the company and the dividends were paid to Hall as a trustee; this constituted him a shareholder, though he had not executed the deed of settlement. *In re The St. George's Steam Packet Company (Maquire's case)* (3).

Nov. 8.—THE LORD CHANCELLOR.—I felt perfectly satisfied from what passed yesterday, that I could not satisfactorily dispose of this case upon the evidence before me; and therefore I offered to give Mr. Bacon's client an opportunity of proceeding to establish, if he could, his claim at law. This was declined, and therefore I must dispose of this case upon my own view of the evidence before me. Now, nothing is more simple than the facts of this case, and nothing, as it appears to me, more simple than the law as applicable to those facts. Here, a lady who held certain shares as representative of her husband, being about to marry again, assigns those shares to a trustee for her; that is, she executed a deed professing to assign her interest in these shares, and from that act the conclusion is drawn that there was an actual transfer. Now transfer there is not; but there is an assignment of her interest therein by deed; and this gentleman, who came forward merely to protect the interest of this lady, as trustee under her marriage settlement, is attempted to be made a contributory and liable personally to all the debts of the concern. It would be a hard case, if a party thus acting were to find himself involved in all the liabilities of a bankrupt speculation, which may involve the amount of millions. But if such is the law that that burden must be thrown upon him, it is a hardship he must endure;

but to me it is a matter of extreme anxiety to see, before I impose upon a person that responsibility, that the facts of the case clearly justify me in doing so. Now no one can doubt the utility of the Winding-up Act; but it is of vital importance to parties, whether they are to be held liable as contributories; and I have no more right to deal lightly with the claim against a party, as contributory, than I should have, in trying a case at Nisi Prius, to direct the jury to find for the plaintiff before the case is proved against the defendant; for it is nothing more or less than trying his liability to an indefinite amount. Now, whether the ground of liability be called legal or equitable it makes no distinction; because, what I have to decide in this case is, whether there is anything to make him legally liable to the creditors of the concern. I will state shortly what there is in the evidence before me to shew that he had in any manner made himself a shareholder in this concern. It appears by his own statement, in answer to an affidavit swearing that he had communicated the fact of the assignment to some officer of the company, that the communication was made, not for the purpose of being a shareholder in the concern, but simply for the purpose of cautioning the company against the payment of the dividends to the party, to whom they might otherwise have been paid. The fact of the verbal communication was sworn to by one of the clerks of the concern; and Hall admits that he did make it, but for that purpose only. From the time of that communication the dividends were received by him, but the shares were never transferred, and they continued to stand in the name of the original owner. Hall received the dividends, but there is nothing to shew that he received them, or applied for them, or that they were paid to him, in his character of assignee of the shares. Some of the receipts are on behalf of the personal representatives, some by procuration: and there is not one in which he purports to receive the dividends as assignee or owner of the shares, except in one instance, where, after the simple signature of his name some third person has written the word "trustee." He denies that that was done by him or that he had any knowledge of it, and there is nothing to lead to the

(2) 18 Law J. Rep. (N.S.) Chanc. 259.

(3) Ibid. 256.

suspicion that it was done by him or with his knowledge. The evidence is that it was done by a clerk of the company; and, except those two facts, there is nothing whatever to connect him with the company, or to shew that he ever intended to become a member of the company, or that the company ever looked upon him as such. In both cases, means are provided by which that is to be done. In the case of an assignment, and the assignee not taking the proper steps subsequently to become a member, the deed of settlement provides, that after six months the shares are to be forfeited. So again, if, being assignee, he is desirous of becoming a member, he has certain means of bringing it under the consideration of the directors, whether they will receive him as a member or not. Now, neither of these steps is taken, either by the company, or by the person to whom the shares are assigned; but the whole that appears to have taken place was the transaction to which I have referred. The Master on these grounds has held him to be a contributory, and therefore liable to contribute, in proportion to these shares, to all the liabilities of the company. The Vice Chancellor Knight Bruce has concurred in that opinion. Supposing an action were tried legally raising the question of liability to the debts and obligations of the company, is there the least chance, independently of the technical difficulties that surround this act, of any jury coming to the conclusion that he was liable? I should not speak so strongly as to the probable results of an action, were I not supposing an action, where this evidence, and this evidence only, would be presented to the jury. If I am to deal with the question, I must deal with it upon the evidence before me, and I must make such observations as strike me to be proper to guide and regulate the conclusion to which I have come. If the respondent still wishes to have an opportunity of trying the question at law, I will not consider him as barred by his having previously declined that offer.

Mr. Bacon, after referring to the difficulties that stood in his client's way of trying the question at law by reason of the previous decisions of courts of law under the Joint Stock Companies Act—*Ness v.*

Angas (4), *Ness v. Armstrong* (5), asked time to consider whether he would accept the offer.

The LORD CHANCELLOR.—I think it right to give you that opportunity. The question is, whether the party is a contributory. As to that, I have my instructions from the act of parliament, which I cannot go out of; which says, "the word 'contributory' shall include every member of a company," which this party clearly is not; and also "every other person liable to contribute to the payment of any of the debts, liabilities, or losses thereof, whether as heir, devisee, executor or administrator of a former member of the same, deceased, or otherwise howsoever." The question, therefore, before me is, whether this party is proved before me to be liable in any character to contribute to the losses of the concern, that is, liable independently of this act. A party cannot complain when such a definition is referred to by the act as to the party who is to be the contributor. It gives him the opportunity of shewing that the party, sought to be fixed as a contributory, is so liable. I am of opinion that the evidence before me does not shew such a liability; and I am only adopting the ordinary course in saying, that though it is not proved here, I will give the party an opportunity of proving at law the legal liability. I will not make a final order until I know whether the party will avail himself of that opportunity.

Nov. 10.—*Mr. Bacon* asked that the case might be sent to law in the shape of an issue; but the Lord Chancellor said that the Court never directed an issue where, as in the present case, an action would try the question. The motion might stand over, with liberty to the official manager to take such proceedings at law as he might be advised; and that Hall's name should not be struck out of the list of contributories until the question was decided; but no step must be taken against him as contributory in the mean time.

(4) 18 Law J. Rep. (N.S.) Exch. 470.

(5) Ibid. 473.

V.C.
Nov. 9; } THE ATTORNEY GENERAL v.
Dec. 3. } BROWN'S HOSPITAL.

Charity — Information — Visitatorial Powers of the Bishop of Lincoln.

An almshouse, called Brown's Hospital, was founded at Stamford by letters patent, in the reign of Richard the Third, and statutes and ordinances for its regulation were made by the founder. These statutes and ordinances were revised in the reign of James the First, when it was directed by letters patent that the Bishop of Lincoln for the time being should from time to time examine and inquire into the ancient statutes, laws, and ordinances of the charity, and should abolish such as were repugnant to the laws of the kingdom, and should make such other good and salutary laws and ordinances, as well concerning the divine services as concerning the government and direction of the warden, confrater, and poor to be supported in the hospital, as should appear to the said Bishop good, useful, fit, and salutary, so long as they should not be inconsistent with the laws of the realm or the statutes of the founder:—Held, upon an information filed to effect an alteration in the management of the charity, that the Bishop of Lincoln was not entitled to general visitatorial powers, and could exercise no controul over the revenues of the hospital, which were subject to the jurisdiction of this Court.

This was an information filed by the Attorney General at the relation of certain inhabitants of the town of Stamford, and it stated that letters patent were granted by Richard the Third, in the second year of his reign, to William Brown, of Stamford, entitling him to found and establish at Stamford a perpetual almshouse or hospital, to consist of one warden, a secular chaplain, and one confrater; that the said W. Brown died in 1488, without having completed the establishment of the said almshouse, having by his will, dated the 17th of February 1488, appointed Margaret, his wife, his executrix, who shortly afterwards died, having appointed Thomas Stokke her executor; and that letters patent were then granted by King Henry the Fifth, in the ninth year of his reign, to Thomas Stokke, giving him the same

powers for founding the almshouse at Stamford as had been granted to William Brown; that the said almshouse was thereupon founded by the said Thomas Stokke, and a deed was executed by him on the 9th of October 1495, by which he ordained certain statutes for the management thereof, and by one of such statutes it was ordered that the said almshouse, which was to be called by the name of Brown's Hospital, should be in a headmost place in Stamford, with a chapel and other buildings, and there should be therein one warden and a confrater with him, and twelve bedesfolks of both kinds, that is to say, ten men and two women, under the reasonable rule and government of the said warden and confrater and their successors; that a certain oath should be taken by the said warden, confrater, and bedesfolk, upon their admission, before the dean of Stamford for the time being, or before the vicar of All Hallows, in Stamford; and after the death or removal of the said warden, confrater, and bedesfolk, the right of supplying the vacancies thereby occasioned was given, first, to the dean of Stamford and vicar of All Hallows for the time being, then to the heirs of the said William Brown, and their heirs, then to the aldermen of Stamford and the abbot of Crowland for the time being, then to the Bishop of Lincoln for the time being, and then again in the like succession in perpetuity. Directions were also given for the performance of divine service upon every working and ferial day in the chapel of the hospital, by the warden or confrater, and also for the performance of divine worship upon every Sunday and holiday in the church of All Hallows, by the said warden and confrater, who were to attend and help in the quire of the said church. And by certain other statutes the stipends of the warden and confrater and bedesfolk were fixed, and it was ordained that the constitution thereby established should never be changed.

The information further stated, that the said hospital having been founded, continued to exist down to the reign of King James the First, when considerable augmentation having been made in the possessions thereof, by endowments and otherwise, and doubts having arisen respecting the validity of the letters patent, other letters

patent were granted by King James the First, which, after confirming all the statutes and ordinances made by Thomas Stokke, directed that the Bishop of Lincoln for the time being, with the assistance and consent of the Archbishop of Canterbury for the time being, should from time to time revise, examine, and inquire into the ancient statutes, laws, ordinances, and constitutions of the almshouse, and so many and such only of the same as and as far as the same were repugnant to the laws and statutes of his said Majesty's kingdom of England, should thoroughly take away, abolish and obliterate, to the intent that they be not thereafter put to use or execution; and also make and constitute so many such and other like good, fit, and salutary statutes, laws, ordinances and constitutions in writing, as well concerning the divine service daily to be celebrated in honour of God in the aforesaid hospital, as concerning the government and direction of the warden, confrater, and poor to be supported in the hospital aforesaid, as and which should appear to the said Bishop, with the assistance and consent of the said Archbishop, good, useful, fit and salutary, not being contrary nor repugnant or derogatory to the ancient statutes, ordinances and constitutions of the aforesaid hospital theretofore made, so far as the said ancient statutes, ordinances and constitutions be not or should not be contrary or repugnant to the laws or statutes of the kingdom of England; and to revoke, change, determine, augment, alter, or make anew, as to the said Bishop should from time to time appear more expedient, all and each of them or any of them so made or to be made anew, according to the real meaning of his said Majesty's letters patent, which said statutes, laws, ordinances and constitutions, so to be made and constituted as before mentioned, his said Majesty thereby granted, enjoined, and commanded that they be from time to time, in future, inviolably observed, kept and performed; provided, nevertheless, that the said statutes, laws, ordinances and constitutions to be made, constituted and ordained as before mentioned, were not contrary or repugnant to the laws or statutes of his said Majesty's kingdom of England, nor to the ancient statutes, ordinances and constitutions of

the said hospital, so far as the said ancient statutes, ordinances and constitutions of the said hospital were not contrary or repugnant to the laws or statutes of his said Majesty's kingdom of England. And his said Majesty thereby granted to the said hospital, as therein more particularly mentioned, all the lands or other hereditaments in Stamford aforesaid or elsewhere within England, of which the warden, confrater and poor of the almshouse had in fact, if not by right, quietly enjoyed for sixty years then last past preceding the date of the said letters patent.

The information then stated that the last-mentioned letters patent now constituted the governing charter of the said hospital; that in the year 1674, in consequence of the warden and confrater having infringed many of the statutes for the regulation of the said hospital, a revision of the ordinances was made by Bishop Fuller, the then Bishop of Lincoln, and confirmed by the Archbishop of Canterbury, under the powers granted by the letters patent of King James the First; that in the year 1709 a further revision of the statutes and ordinances was made by Bishop Wake, the then Bishop of Lincoln, and confirmed by the Archbishop of Canterbury; that in the year 1786 the said statutes were again revised by Bishop Green, the then Bishop of Lincoln, and confirmed by the Archbishop of Canterbury; that such statutes were again revised in the year 1828, by Bishop Kaye, the then Bishop of Lincoln, with the like approval of the Archbishop of Canterbury; and that by all of the said revisions, various ordinances were made touching the leasing of the lands belonging to the hospital, the management of the property, and the distribution of the funds thereof.

The information then stated that since the establishment of the said hospital the possessions thereof had been largely augmented, and the average annual income of the same amounted to from 1,200*l.* to 1,300*l.*, which was much more than sufficient for the maintenance of the charity, according to the original foundation thereof and the charitable purposes of the founder; and it was submitted, that the authority given by the letters patent to the Bishop of Lincoln for the time being, to make

and constitute statutes either concerning the divine service in the hospital or concerning the government and direction of the warden, confrater and poor thereof, did not authorize the said Bishop to make statutes concerning the distribution of the revenues of the said hospital, or, at all events, did not authorize the said Bishop to direct any distribution of such revenues which should be contrary to the ancient statutes. And the provision contained in the statutes of Bishop Kaye, by which an appropriation was directed between the warden and confrater of the hospital of the entire revenues thereof left, after the specific payments thereby provided to be made out of such revenues, was contrary and repugnant to the ancient statutes of the charity; and that, in any event, such appropriation was not warranted by any powers conferred on the said Bishop by the said letters patent of King James. That in consequence of such doubts having been raised as to the nature and extent of the powers conferred on the Bishop of Lincoln for the time being, the present Bishop of Lincoln had declined interference in the affairs of the said charity until such doubts should be removed, and the nature and extent of his powers ascertained and defined by competent authority.

The information therefore prayed that the said charity might be regulated by the Court; and that the powers and authorities vested in the Bishop of Lincoln for the time being, under the letters patent of King James, might be ascertained and defined, and such declaration made by this Court in reference thereto as should be necessary for that purpose; and that the duties of the said warden and confrater in reference to the performance of Divine worship in the parish church might be declared; and that the rights and interests of the Vicar of All Hallows in reference to the matters claimed by him might also be ascertained and declared; and that a scheme might be settled under the direction of the Court for the future government of the charity and of the persons entitled to the benefits thereof, and for the distribution of the revenues of the said charity; and that it might be ascertained in whom the general powers of visitor of the said charity were now vested; and that a pro-

vision might be made for the distribution of the surplus revenues after satisfying the purposes of the said charity, according to the original intentions of the founder thereof.

The information now came on for hearing, and a reference to the Master according to the prayer had been agreed upon between the parties as to all the different parts thereof, with the exception of that relating to the visitatorial powers of the Bishop of Lincoln.

Mr. Rolt and *Mr. Goodeve* appeared for the relators, and submitted that the authority given by the letters patent of King James to the Bishop of Lincoln to make and constitute statutes, either concerning the divine services, or concerning the government and direction of the warden and confrater, did not authorize the said Bishop to make statutes concerning the lands and revenues of the charity, or to make any directions as to the distribution of such revenues.

Mr. R. Palmer and *Mr. Wright* appeared for the Bishop of Lincoln, and contended that he had a general visitatorial power over the charity. This principle had been acted upon by several Bishops of Lincoln ever since the letters patent granted by King James. The present Bishop of Lincoln was willing to submit to the direction of the Court, and it was suggested that the best method of reserving to him the powers hitherto exercised would be to direct that whatever was done should be with his consent. A similar order had been made in the case of *The Attorney General v. Dulwich College* (1). This charity was for mixed spiritual and eleemosynary purposes, and whenever such was the case the general visitor of the charity had jurisdiction over the distribution of the revenues as well as over the management and affairs of the charity. All that was now contended for however by the Bishop, was expressly given him by the letters patent of King James.

The following authorities were cited—

- 1 *Black. Com.* p. 482, 10th edit.
- Sutton's Hospital case*, 10 Rep. 31, a.
- Philips v. Bury*, 2 Term Rep. 346.
- The Attorney General v. Talbot*, 3 Atk. 662, and 1 Ves. sen. 78.

(1) 4 Beav. 261.

The Attorney General v. Middleton, 2 Ves. sen. 327.

The King v. the Bishop of Ely, 1 Sir W. Black. 71.

Ex parte the Berkhamstead Free School, 2 Ves. & Bea. 134.

Ex parte Kirkby Ravensworth Hospital, 15 Ves. 305.

Mr. Bethell and *Mr. Nevinson* appeared for the corporation of Stamford, and

Mr. J. Parker and *Mr. Craig*, for the vicar of All Hallowses.

Mr. Rolt, in reply, said, the question must be decided upon the construction of the letters patent of King James, and it was evident that a general visitatorial power was not given by them to the Bishop of Lincoln, and that even if the Bishop of Lincoln had been made the general visitor, still he would have no power to interfere with the revenues where the charity was founded for eleemosynary purposes. An attempt had been made to set up a common law right to ecclesiastical visitation: this was altogether wrong; a Bishop had, no doubt, jurisdiction over ecclesiastical corporations, but not over corporations founded for eleemosynary purposes. The statute 14 Eliz. c. 5. directed the Bishops to visit hospitals where no general visitors were appointed, but this statute was entirely obsolete. It would be found that the same statute directed that no rogues should be imported into this country from Ireland. In this case the warden and confrater of the hospital were incorporated, but not the poor men and women who were only recipients of the charity. By the original statutes, the founder being a private person, the heirs of the founder were appointed by implication the visitors of the charity, and the charter of King James had no expression whereby a surrender of the old charters could be assumed, and the Crown had no right to grant a new charter without a previous surrender of the former charters. The following cases were cited—

The Attorney General v. Magdalen College, Oxford, 10 Beav. 402; s. c. 16 Law J. Rep. (N.S.) Chanc. 391.

Eden v. Foster, 2 P. Wms. 324.

Dec. 3.—The VICE CHANCELLOR.—In this case the question is, whether in the

charter of King James the First it can be made out that the Bishop of Lincoln is a general visitor of the charity. Now, the Bishop has put in an answer submitting the question whether he is not such visitor, and certainly acts have been done by former Bishops of Lincoln which assume that such is the fact; but, upon looking at the charter, the whole of which I have read over, my opinion is that such is not the case. In *Ex parte the Berkhamstead Free School*, Lord Eldon, speaking of the decree which declared the warden of All Souls was the visitor, but that the revenues were subject to the jurisdiction of this Court, expresses his approbation of that decree, and that there should be the limited visitatorial powers without the right extending to the management of the general revenues. His Lordship states it as having been decided by the Court, and being quite clear that where there is a local visitor as to the conduct and management of a school, if in the original instrument a trust is expressed as to the application of the revenue, this Court has jurisdiction to compel a due application of such revenue. The Court has in fact and in practice acted upon the ground of such jurisdiction, of which there is no doubt. In the original charter of James, the mere words which bear upon the question are those which give a power to abrogate the ancient statutes and institute new ones. The words used are "*dum consonantia*," and it appears to me on the plain construction of those latter words, they must be taken to extend to an abrogation of the ancient statutes only so as those made in their stead should not be inconsistent with them. It would be a gross inconsistency if it could be said that there might be a total abolition of all the existing statutes. I think the words "*dum consonantia*" must be taken to be restrictive as well on the power of abrogating as of substituting; it is, in fact, a mere power to visit, and my opinion is, upon the only point which has been submitted to me, that the Lord Bishop of Lincoln has not the general power over the revenues, but those revenues having from some cause or other increased, the jurisdiction is with this Court, and, subject to that, the parties will arrange the minutes.

M.R. }
Dec. 3. } GREGORY v. MARYCHURCH.

Evidence — Publication — Affidavits relating to matters in question subsequently discovered, Proof of.

After publication had passed in this cause, the plaintiff discovered two affidavits made in a cause of Evans v. Davies, the one by the defendant in that cause, who was since dead, and whose estate this suit sought to make liable for a sum of money, and the other by a witness in this cause. Upon a motion to examine witnesses to prove these affidavits and the signatures to them, with a view to discredit the testimony which had been given in this cause,—Held, in the case of the witness, that the plaintiff must adopt the ordinary course of discrediting his testimony, to give the witness an opportunity of explaining. In the case of the deceased party in the suit of Evans v. Davies, leave was given to the plaintiff to exhibit an interrogatory to prove the affidavit, that the plaintiff might be in a situation to tender it as evidence at the hearing, subject to any questions as to its being admissible, and the defendant was to be at liberty to exhibit an interrogatory to prove the circumstances relating to the affidavit, or to prove that no such affidavit existed.

This was a motion, on behalf of the plaintiff, asking for liberty, after publication passed, to examine witnesses to prove two affidavits, sworn and filed in the Affidavit Office on the 3rd of August 1847, in a cause wherein John Evans was the plaintiff and David Davies was the defendant, one of which affidavits purported to have been made and sworn by David Davies, and the other by Edward Eager, and also to prove the signatures to such affidavits, and that the plaintiff might be at liberty to exhibit interrogatories for the aforesaid purposes.

The suit was instituted by Barnard Gregory, on behalf of himself and all other the joint creditors of David Davies deceased, and John Evans, against Henry Weldy Marychurch, and Elizabeth his wife, formerly Elizabeth Davies, and Samuel Sturgis. Elizabeth Marychurch was the

widow and executrix of David Davies deceased, who was a solicitor carrying on business in partnership with John Evans; and the object of the suit was to make the estate of David Davies liable for a sum of money belonging to the plaintiff, alleged to have been received by John Evans, and by him appropriated to his own use. By the answer, it was stated that the partnership of Davies and Evans was dissolved before John Evans received the money of the plaintiff. It therefore became material to ascertain, whether, when the money was received, the partnership did or did not exist. Witnesses were accordingly examined in the cause, both by the plaintiff and the defendants, and on the 10th of November last publication passed. It was subsequently discovered that, on the 3rd of August 1847, two affidavits were sworn in the cause of *Evans v. Davies*, and filed in the Affidavit Office, the one by David Davies and the other by Edward Eager, and this notice of motion was given in order that they might be proved in the cause.

In support of this application, the plaintiff and his solicitor made a joint affidavit, stating that affidavits had been filed in the cause of *Evans v. Davies*, and that it was a material question at issue in the cause, whether the plaintiff employed Messrs. Davies & Evans, as his attorneys, to bring and prosecute an action at the suit of the plaintiff and his wife, which was commenced on or about the 13th of May 1847, in the Court of Common Pleas, against Sarah Matters; that it was alleged by the bill in this cause that Messrs. Davies & Evans were in partnership together at and after the commencement of the action, and that Sarah Matters paid certain monies to Messrs. Davies & Evans, as the attorneys of the plaintiff in such action; that the answer of the defendant Elizabeth Marychurch stated that the partnership of Davies & Evans was dissolved on the 5th of May 1847; and that the plaintiff did not employ David Davies as the attorney of himself and his wife in such action, but that he employed John Evans only as such attorney, and that Sarah Matters paid the money to John Evans individually, and not to the firm of Davies & Evans; that the affidavit of David Davies, sought to be proved in this

cause, contained the following passage:—
 “And I further say that myself and the said John Evans were attornies for the plaintiff in an action in the Court of Common Pleas, at the suit of Barnard Gregory and Margaret his wife against Sarah Matters, in which judgment, upon a Judge's order, was recovered and signed on the 18th of June 1847 for the sum of 300*l*. And I say that the said John Evans received from the said Sarah Matters, within a few days after the said judgment was signed, several sums, amounting in the whole to 150*l*., which money the said John Evans applied to his own use, and the receipt of which, by the said John Evans, he did not enter, or cause to be entered in the partnership books, nor did he communicate the same to me, but I was accidentally informed thereof by the said Sarah Matters, and upon my stating to the said John Evans what the said Sarah Matters had so stated to me, and requiring an explanation from him, he the said John Evans observed, that it was a transaction between him and an old client of his, to whom he would be answerable for the money, and upon my observing that the firm of Davies & Evans, the attornies in the action, would be liable to the plaintiff for the monies so received by him, the said John Evans replied, he would “take that upon himself”; that the said affidavit of the said David Davies contained other passages material to the issues in this cause, and that it was requisite that the plaintiff should be at liberty to state or read the said affidavit, as evidence on his behalf in this cause.

Edward Eager had been examined as a witness on behalf of the defendant Elizabeth Marychurch, and in his affidavit it was stated “that he was present at a meeting between the said David Davies and John Evans on the 5th of May 1847 at their office, when after some discussion between them respecting a notice of dissolution of partnership, which the said David Davies had, on the 5th of May 1847, given to the said John Evans, it was arranged and agreed by and between the said John Evans and David Davies, that the said partnership should be finally dissolved as from the 1st of August then

next.” That it was believed to be material that the plaintiff in this cause should be at liberty at the hearing to state or read the said affidavit of the said Edward Eager, as evidence, in case his deposition should be used on such hearing or otherwise. The affidavit then stated that the deponents were ignorant of the existence of the affidavits sought to be proved, until the 22nd of November last, when it was accidentally discovered that the same had been filed. Nothing was stated or charged in the bill respecting the affidavits, or that David Davies had ever stated or admitted that the firm of Davies & Evans were employed by, or were the attornies of the plaintiff in any suit or action.

Mr. Beales, in support of the motion, referred to *Knight v. Knight* (1) and *Willan v. Willan* (2). As the affidavits had not been referred to in the pleadings, the plaintiff was prevented from producing them as exhibits, neither could he prove them at the hearing under the 43rd Order of August 1841 (3). It was intended to use the affidavit of Edward Eager, who had been examined as a witness in the cause, to discredit his evidence.

Mr. Turner and *Mr. Shebbeare*, for the defendants.—*Mr. Davies* is dead, and his affidavit cannot be explained. The affidavit of *Mr. Eager* also was a special affidavit; and if this application should be granted now, as publication has passed, there will be no means to cross-examine him respecting the affidavit he had made.

Mr. Beales, in reply.

THE MASTER OF THE ROLLS.—In consequence of the Orders, if I refuse the application, the plaintiff may be deprived of this evidence. The cases are different between a witness and the parties to a suit. In the case of a witness, if it is the intention to discredit his evidence, the ordinary course must be adopted: he then has an opportunity of explaining. It is the same where an affidavit of a witness is produced, the result of which is to discredit his tes-

(1) 4 Madd. 1.

(2) 19 Ves. 590.

(3) Ord. Can. 177; 10 Law J. Rep. (N.S.) Chanc. 414.

timony; there is no reason why the ordinary course ought not to be followed. But, on the other hand, when the party who made the affidavit is dead, there is no objection to allow the plaintiff to exhibit an interrogatory to prove it, but it cannot be done further than to verify the signature of the party, and to shew that it is an affidavit made in the course of legal proceedings. I must assume that it is supposed to relate to something of importance at the hearing, the plaintiff therefore ought to be in a situation to tender it in evidence, that if necessary an inquiry may be directed upon it; but at the same time I must protect the defendants from the introduction of any new evidence. Had this affidavit been discovered before, it might have been tendered as evidence. It is now asked, that the plaintiff may be enabled to tender it, which can only be allowed, subject to any objections which may be taken as to its admissibility; and if the pleadings are not in a state at the hearing to enable the Courts to act, the defendants may have a right to further inquiry, and be at liberty to explain his evidence. I cannot, therefore, make an order which will have the effect of preventing the affidavit being tendered; neither can I prevent the defendants from exhibiting interrogatories to prove the circumstances relating to the affidavit, or from proving that there is no such affidavit. Though this application is not caused by any neglect of the plaintiff, still he must pay the costs.

M.R. }
Dec. 20. } *In re* HAIGH.

Costs — Taxation — Legacy Duty and Stamps—Solicitor, Payment by, not a Professional Disbursement, but a Cash Payment.

The town agents of a country solicitor, in passing the accounts of an administrator, paid four sums amounting to 11l. 8s. 6d. at the Stamp Office for legacy duty and stamps. These were included by the country solicitor in his bill of fees and disbursements, but upon taxation they were struck out, by which the bill was reduced more than one-sixth.

Upon a petition asking for liberty to except to the Taxing Master's certificate,—Held, that the payment for legacy duty and stamps could only be made as agent, and that it was not a professional disbursement; that it ought to be inserted in the cash account, and not in the bill of fees and disbursements; that the Taxing Master was right: and the petition was dismissed, but without costs.

This was the petition of George Haigh, a solicitor, asking for liberty to except to the certificate of the Taxing Master, and to the taxation of the costs of the reference, and that four payments, amounting to the sum of 11l. 8s. 6d., deducted or excluded from the bill of fees and disbursements might be restored thereto, and that it might be referred back to the Taxing Master to review his certificate, and that Mr. Wilson might pay the costs.

In October 1848 Mr. Haigh was employed by William Bleasdale Wilson as his solicitor in the administration of the estate of George Wilson, of which W. B. Wilson was the administrator.

On the 6th of June 1849, Mr. Haigh, through his town agents, passed the administration accounts, and paid four sums, amounting to 11l. 8s. 6d., at the Stamp Office, for legacy duty and stamps.

On the 10th of September 1849 Mr. Haigh sent his bill of fees and disbursements respecting the administration to Mr. Wilson, including therein the four sums, amounting to 11l. 8s. 6d.

On the 27th of October Mr. Wilson obtained an order to tax the bill, and on the 9th of November the Taxing Master taxed the bill, which amounted to 24l. 2s. 11d., at the sum of 20l. 8s. 3d., upon which Mr. Haigh's agent carried his costs of the taxation into the Master's office, and they were taxed at 6l. 18s. 5d.

On the 21st of November, before the certificate of taxation was issued, Mr. Wilson's agent applied to the Taxing Master for leave to review the taxation, when for the first time objections were made to the retention in the bill of the four sums forming the 11l. 8s. 6d.

Upon reviewing the taxation, the Taxing Master decided that the 11l. 8s. 6d. had been improperly inserted in the bill, and

that it ought to be deducted. This reduced the bill more than one-sixth ; Mr. Wilson's agent therefore carried his costs of the taxation into the Master's Office. The Taxing Master refused to state any special circumstances, and taxed and allowed the costs of Mr. Wilson ; and certified that the bill of costs, amounting to 24*l.* 2*s.* 11*d.*, included payments of money made by the petitioner on account of Mr. Wilson, amounting to 11*l.* 8*s.* 6*d.*, which appeared to him improper, and which therefore he had deducted, whereby the bill, as taxed, was less by a sixth part than the bill delivered.

Mr. Turner and *Mr. Karlake*, for the petitioner.—The 11*l.* 8*s.* 6*d.* was a payment made by the agents of the petitioner in the performance of a professional duty, and was properly entered in the bill of costs as a professional disbursement, and ought not to have been taxed off—*In re Bedson* (1), *Harrison v. Ward* (2), *Hindle v. Shackleton* (3), *Franklin v. Featherstonhaugh* (4). Had any request been made to the petitioner, he would have modified the charges himself, which would have obviated the necessity of re-taxing the bill.

Mr. Prior, for Mr. Wilson.—The charge of money paid for legacy duty and stamps was not a payment made by the solicitor in the due discharge of his duty ; he was neither bound by law, neither was he by custom looked upon as the person to make such payments ; but if such payments were made by the solicitor, they were made in the character of agent only, and formed an item in the cash account, and could not be inserted in the bill of fees and disbursements—*In re Remnant* (5):

Mr. Turner, in reply.

The MASTER OF THE ROLLS.—I could wish a higher authority to decide this question, though I cannot recommend

an appeal, but it would be satisfactory, and for the benefit of suitors generally, to have the decision of a higher tribunal. It was said the case was hard, but why ? It is not denied but that the sum disbursed for legacy duty and stamps is to be refunded, or that the client is in some way bound to repay the money. It is impossible for the question to arise except in cases similar to the present, but where one-sixth of the bill is taxed off, the solicitor becomes liable to pay the costs of the taxation. This caused the struggle to include the disbursement in the bill of costs, with a view to make the proportion taken off less in relation to the whole bill. The question is not whether more or less is to be taken off the bill, the object only being to alter the proportion taken off. If less than one-sixth of the items, strictly and properly charged as professional disbursements, is taxed off, the question now at issue could never arise ; but if the solicitor has charged one-sixth more than he ought to have done for professional services, then immediately the question must arise. But admitting the previous cases to be inconsistent, and that some of them might sanction the admission of such an item as the one in question, still, taking the whole of those cases into account with the practice of the respectable part of the profession, I am of opinion that the payment of legacy duty and stamps is a disbursement to be made by the solicitor as the agent of his client, and not as a professional disbursement ; and it is the practice to insert it as an item in the cash account, and not in the bill of fees and disbursements. The Taxing Master is therefore right in the course he has taken, and I cannot allow any exceptions to be taken to the certificate ; the petition must consequently be dismissed.

Mr. Prior asked for the costs.

The MASTER OF THE ROLLS. — The petitioner was not concluded by the case of *In re Remnant*, I shall therefore not give any costs.

(1) 9 Beav. 5 ; a.c. 15 Law J. Rep. (n.s.) Chanc. 153.

(2) 4 Dowl. P.C. 39 ; a.c. 1 Har. & Wol. 353.

(3) 1 Taunt. 536.

(4) 1 Ad. & E. 475 ; a.c. 3 Nev. & Man. 779 ; 3 Law J. Rep. (n.s.) K.B. 163.

(5) 18 Law J. Rep. (n.s.) Chanc. 374.

K. BRUCE, V.C. }
Nov. 19. } WEST v. SWINBURNE.

Creditors' Suit—Practice—Costs.

Motion by plaintiff in a creditors' suit, after decree, to restrain proceedings of other creditors in other suits. Practice as to the payment to such creditors so to be restrained of their costs of such proceedings and of the motion.

On the 31st of March 1849, Mr. West filed a creditors' bill against Mr. Swinburne and Mr. Pace, and against Mr. Hansill, who was the executor of Charles Oswald, deceased, for the administration of the estate of Mr. Oswald, and answers were put in, but the cause proceeded no further. This was the cause of *West v. Swinburne*.

Mr. Swinburne filed another creditors' bill against Mr. Pace and Mr. Hansill for the like purpose, and obtained a decree on the 12th of June 1849. This was the cause of *Swinburne v. Pace*.

Mr. Hansill, the executor of Mr. Oswald, now moved that the proceedings in the suit of *West v. Swinburne* might be stayed, and that Mr. West might be at liberty to come in under the decree in the suit of *Swinburne v. Pace*, for the purpose of proving his claim, and that the costs of all parties might be taxed and paid out of the estate of Charles Oswald, and that the parties might be at liberty to apply for their payment out of the monies to be paid into court in the suit of *Swinburne v. Pace*.

Mr. G. L. Russell, for the motion.

Mr. Hislop Clarke, for Mr. West, said that he would consent to the motion on being paid his costs directly by the executor; but contended that Mr. West ought not to have the payment of these costs postponed in the manner proposed in the notice of motion.

Mr. G. L. Russell, in reply, stated that there were no funds then realized, and urged that it would be unjust and unreasonable that the executor should pay these costs out of his own pocket.

KNIGHT BRUCE, V.C. said, that the method of payment of these costs had very frequently been made a matter of contest and discussion, and that he desired that

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the question should be referred to the Registrars.

The case was referred to the Registrars accordingly, and the following certificate was returned:—

“Mr. Walker, Mr. Bicknell, Mr. Hussey, Mr. Bedwell and Mr. Colville, Jun. are of opinion that the costs of the plaintiff (West) up to the time that he had notice of the decree in the cause of *Swinburne v. Pace*, and also the costs of this application, should be taxed. If the defendant, Mr. Hansill, the executor, admits assets, then that he should at once pay such costs; if not, and upon affidavit being made that he has no assets, then that the plaintiff (West) should be at liberty to add his costs to his claim, and go in for payment under the decree made in the cause of *Swinburne v. Pace*. The defendant's costs, and what, if anything, he shall pay to the plaintiff (West) for his costs, will be added to his costs in the cause of *Swinburne v. Pace* at the proper time, or allowed him in his accounts in that cause.”

An order was made on this motion in accordance with the terms contained in the certificate.

L.C. }
Nov. 27, 28, 29. } COOKE v. TURNER.
COOKE v. CHOLMONDELEY.

Will, Suit to establish—Issue devisavit vel non—Forfeiture—Heir under Disability—Trustee.

A testator, who was the subject of a commission of lunacy, at the time of making his will, and up to his death, being seised of large real estates, made his will, whereby after giving certain benefits to his daughter and heiress-at-law, he declared, that if she or her husband, or any person on their or either of their behalf, should dispute his will, or if any proceedings should be taken by any person whomsoever, whereby his daughter or her husband might attain a larger interest in his estates than that given by his will, and she and her husband should not disavow or resist such proceedings, then he revoked the benefits thereby given to her. The daughter was married at the date of the will, and on her marriage articles were executed, by

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which the husband covenanted with A. B, a trustee, to settle her present and future property upon trusts for the benefit of himself, his wife, and their issue. There was no issue of their marriage. In a suit by the trustees of the will, to establish it, the evidence in the cause, on the part of the plaintiffs, went to prove the competency of the testator, and there was no evidence to the contrary; and the heiress-at-law did not ask an issue:—Held, affirming the decree below, that A. B. had a sufficient prima facie title as trustee for the unborn issue; and the Court directed an issue devisavit vel non, the plaintiffs in equity to be plaintiffs at law, and A. B. to be the defendant at law.

Sir Gregory Osborne Page Turner was, at the time of his death, seised of divers freehold and copyhold hereditaments for an absolute estate of inheritance. On the 19th of December 1823 he was found, by inquisition under a commission of lunacy, to be of unsound mind; and in 1826 that inquisition and finding were traversed on his behalf; but on the trial a verdict was found establishing the finding, and the commission had never been superseded up to the day of his death. On the 18th of June 1841, Sir G. O. P. Turner made his will, by which he professed to devise all his real property to the plaintiffs, Cooke and Dryden, and their heirs, upon trust, out of the rents and profits thereof, to pay to his daughter, the defendant Helen E. Fryer, the wife of the defendant Charles G. Fryer, an annuity of 2,000*l.* for her life; and subject thereto, to pay the rents and profits to his wife during the joint lives of herself and her daughter, and after the decease of either of them, to pay the whole of such rents to the survivor, for her life, with remainder to the first and other sons of his said daughter in tail, with remainders over. Then followed this proviso, "And my will further is, that if my said daughter or her husband, or any person or persons in her, his, their, or any or either of their name, or upon her, his, their, or any or either of their behalf, shall dispute this my will or my competency to make the same, or if my said daughter and her husband, or either of them, shall refuse to confirm this my will so far as he or she can, when required by my executors or either of them

so to do, &c., or if any proceedings whatsoever shall at any time be had or taken by any person or persons whomsoever, by any possible result of which, any estate or interest could be in any way attainable by my said daughter or her husband, or any person or persons in their right of larger extent or value than is intended for her by this my will, and such proceedings shall not be formally disavowed, stayed, or resisted by my said daughter and her husband, to the full extent of their, his, or her ability to do so, then I revoke the use or disposition hereinbefore contained for the raising and payment during the life of my said daughter of the yearly sum of 2,000*l.*; and also the use and disposition hereinbefore contained in her favour (in the event hereinbefore mentioned) of the rents of my estates hereinbefore devised; and all other benefits hereby given to or in trust for my said daughter or derivable by her under this my will, and in lieu thereof," the testator gave to his daughter an annuity of 300*l.* for her life for her separate use, and directed that after the decease of his wife the trustees should accumulate the surplus (after paying the annuity of 300*l.*) of the rents of the devised estates for the benefit of the person or persons entitled to the first estate of inheritance therein under his will; and he appointed the trustees executors of his will.

Sir G. O. P. Turner died on the 6th of March 1843, leaving his widow and his daughter, the defendant Mrs. Fryer, his only child and heiress-at-law.

The marriage between Mr. and Mrs. Fryer took place in 1838, the lady being then under age. By articles executed on that occasion, Mr. Fryer covenanted with the defendant Henry Edmund Fryer, a trustee, that when his intended wife should attain twenty-one, he would concur with her in settling all such freehold, copyhold, and leasehold estates as she should then be possessed of, or become entitled to at any time thereafter, to certain uses for the benefit of himself, his wife, and their children. There were no issue of this marriage. Shortly after the death of Sir G. O. P. Turner, a bill was filed by the trustees for the purpose of establishing the will, and having the trusts of it carried into

execution; and the parties defendants to that bill were the testator's daughter and her husband, the testator's widow, Henry Edmund Fryer, as trustee of the marriage articles, and certain other parties, entitled to the estates in remainder under the will.

The bill alleged that the daughter had refused to execute a deed which the plaintiffs had required her to execute, for the purpose of confirming the will, and that she had refused to do so on the ground that the testator was *non compos mentis* at the time of making the will; and it made various statements with a view to shew the sanity of the testator at the time he made his will. The daughter, by her answer, did not admit the alleged will to be the will of the testator, but said that the paper writing set forth in the bill, and therein called the testator's will, was to the effect therein stated. She admitted that she had not executed the deed tendered to her by the trustees, but she did not answer any of the interrogatories which had relation to or bore upon the question of the testator's competency. Exceptions were taken to the answer for insufficiency, and the Master overruled the exceptions. On the exceptions to the Master's report, the Vice Chancellor of England decided that, as a question of forfeiture was raised, the defendant ought not to be compelled to answer any further—*Cooke v. Turner* (1). Previously to overruling the exceptions to the Master's report, and in pursuance of an order in the cause, made on the 6th of November 1845, a case was stated for the opinion of the Court of Exchequer upon the validity of the clause of forfeiture contained in the will, when the Barons certified that the clause was good and valid in law—*Cooke v. Turner* (2). Various witnesses were examined on the part of the plaintiffs, and, amongst others, the solicitor to the commission, who had also prepared and was one of the witnesses to the alleged will. The evidence went to shew that the making of the will was the spontaneous act of the testator, and that the provisions therein contained were in substance dictated and suggested by the testator himself; and that he fully under-

stood the purport and effect of it. It appeared also, that in February 1841 his health and state of mind was so improved that he was allowed to go about without a keeper; and, on the 23rd of June in the same year, an order was made by the Lord Chancellor for an increased allowance, and he was to be allowed to go to a watering-place or on a tour, as he might be inclined. The defendants did not examine any witnesses.

The cause came on to be heard, before the Vice Chancellor of England, in July 1847, when his Honour made an order directing an issue *devisavit vel non* to be tried, the plaintiffs in equity to be plaintiffs in the issue, and Henry Edmund Fryer, the trustee of the marriage articles, to be the defendant (3).

The defendant Sir Edward G. T. Page Turner, one of the parties entitled in remainder under the alleged will, appealed from that order, and the cause now came on to be heard before the Lord Chancellor.

Mr. Stuart, Mr. James Parker, and Mr. Lewin, for the appellant.—In this case the heiress-at-law has declined to ask an issue, and the Court has directed a trustee, who has no real interest in the matter, to be defendant in that issue. Such an issue cannot decide the question of the validity of this will; for if Mrs. Fryer were to leave an heir, that heir would have a right to try the question over again. Mrs. Fryer was under age when the articles were executed, and therefore no right to or interest in the property passed thereby to the covenantee, and the covenant does not bind the party really interested; and consequently unborn children have no interests to be protected. The evidence taken in the cause satisfactorily proves that the testator was of sound mind when he made his will, and, therefore, as the heiress-at-law does not ask an issue, the Court will, upon that evidence, establish the will—*Levy v. Levy* (4), *Cartwright v. Cartwright* (5).

[The LORD CHANCELLOR.—The bill seeks that the will may be proved and established; why is the Court not to do that by the best kind of evidence—namely, an issue? The

(1) 14 Sim. 218.

(2) *Ibid.* 493; s. c. 15 Mee. & W. 727.

(3) 16 Law J. Rep. (N.S.) Chanc. 487.

(4) 3 Madd. 245.

(5) 1 Phill. 90.

circumstances of the case and the clause of forfeiture raise a strong case for the most rigorous investigation.]

If the party who has the right to contest the will declines to do so, the Court will not *mero motu* direct an issue. The Court is not bound to try abstract truths. Further, as Mr. H. E. Fryer, the trustee, derives title through the heiress-at-law and her husband, the Court is perilling her interest under the will by directing an issue.

Mr. Bethell, for H. E. Fryer, the trustee, contended that as trustee, he had a sufficient *prima facie* interest to demand an issue; and that the Court would so preface the order for the trial of the issue as to protect the heiress-at-law—*Sterling v. Livingston* (6).

Mr. Freeling appeared for the plaintiffs, and

Mr. Willcock, for the heiress-at-law, but he took no part in the argument.

Nov. 29.—The LORD CHANCELLOR.—Since yesterday I have had an opportunity of considering this case, which certainly is one of the greatest possible importance, not only as it may affect the parties in the cause, but as it relates to the general practice of the Court; and the result is, that I cannot accede to the proposition made by the appeal, or alter the decree in the way proposed. I think it is a matter of most serious consideration, for I believe I never had a case before me which more generally affected the jurisdiction of this Court than that which appears on these facts.

Here is a lunatic who was under the protection of this Court for a great number of years; he died, and it appears that pending the lunacy, and while the commission was in full force, a will was made. That fact does not of necessity shew that the will is not a good will. It is very possible that there may have been a period during which the lunatic was competent to make a will, and that such a will, though the commission existed, may be a valid will. No doubt it is a circumstance of extreme suspicion; there is, unquestionably, the strongest presumption arising from the fact of there being a commission existing at

the time, but still it is a presumption, and capable of being rebutted. If that were all it would not be very peculiar, and, certainly, would not be attended with any difficulty; but this paper, which is produced as a will, contains within itself a provision to the effect that any party taking any steps to dispute the will shall lose all benefit under it. Now, one of the parties principally interested in the disposition by the will is the heiress-at-law; so that those who prepared that instrument were desirous that the heiress-at-law, if she disputed it at all, should dispute it at the hazard, if the will were established, of losing all benefit under it: the result of which would be that the heiress-at-law, although she is necessarily without any knowledge of the circumstances attending the execution of the will, is prevented from raising any question.

Then a bill is filed against the heiress-at-law, and against another party who is to be the defendant in the issue, and who derives title under the heiress-at-law; the heiress-at-law, in the expectation of what might come, having made a provision on her marriage, dealing with her expectant interest as heiress-at-law, together with her intended husband. The marriage takes place, and the party who, by the decree, is made the defendant to resist the issue, and resists, therefore, the validity of the will, is a party who derives his interest (whatever it may be) under the heiress-at-law. The plaintiffs seek to establish the will, that is to say, they undertake to shew that they have a title under the will; that the will is a proper will; and they ask the Court, therefore, to establish the will. The Vice Chancellor found the heiress-at-law with her arms tied, unable to say a word; because she could not say a word against the will without being subject, at least, to incurring the penalty which the will attempted to impose on her. And for another purpose, a collateral purpose, fortunately for the disposal, I think, of the cause itself, but for a totally collateral purpose, the opinion of the Court of Exchequer was taken as to the legality of that condition, and the Court of Exchequer has certified that it was a legal condition. It is true the case states the will was a valid will; of course it is so

stated, because the question could not arise if there was no will ; but that is a very different view of the effect of that condition from what arises here, where the question is, whether the will is valid or not. However the effect of that reference to the Court of Exchequer has been, the unanimous opinion of the Judges of the Court of Exchequer that, supposing this will to be a will unimpeachable, and therefore to be considered as the will of the ostensible testator, that that is a legal provision, and that the forfeiture would be incurred by breaking the condition so imposed in the will. It is a very fortunate circumstance that that is assumed to be, or rather proved to be, the rule of law, inasmuch as it tends very much to assist the Court in coming to a right conclusion as to the course it ought to adopt. Of course, therefore, it becomes the duty of the Court to be very careful not to expose the party to the chance of this forfeiture. At the same time it is the bounden duty of the Court to see that it is not made auxiliary to what would, in one view of the case, be a very gross fraud, assuming the will not to be the will of the testator.

The bill is filed by parties interested under the will, and they come and ask the Court to establish the will. They make defendants to that bill the heiress-at-law and the trustee of the settlement, that is to say, the party who derives interest under the heiress-at-law, having himself no beneficial interest in the matter, but being a party bound to protect such interest as was conveyed to him by the settlement of which he is trustee. The heiress-at-law remained passive. Whether she would or would not have done so, if she had been competent, or had been relieved from the condition, if she had been so advised, or what she might have done under other circumstances we have no means of knowing ; but we know that she had no option, otherwise, according to the opinion of the court of law, she would have violated that condition. She had no choice, but was perfectly passive. The plaintiffs, however, must make out their case. If the heiress-at-law had been a single woman, if she had not been under coverture, if she had been in a situation to admit the validity of the will, and had thought proper so to do, all

difficulty would have been removed ; the Court would have had no matter in contest, and all parties concerned agreeing as to the facts on which the Court was to proceed, the Court would in the ordinary exercise of its jurisdiction, not call for proof of that with respect to which there was no dispute, all parties interested concurring in the facts being in a particular position. Those cases, therefore, which have been referred to, in which the Court establishes the will or declines sending an issue in which there is nobody present but the heiress-at-law, have no application to the present case, because there is nothing to try. The Court does not try a will merely because it may itself find some ground of suspicion as to the propriety of its having been obtained, but it directs an issue because the party alone interested, and against whom it is to operate, does not admit it is a good will. What, therefore, under those circumstances, the Court might have thought proper to do if there had been nobody interested against the will but the heiress-at-law, it is not necessary at all to consider. But there are other parties, I think, fortunately for the ends of justice, than the heiress-at-law, because whichever way the result may be, it cannot be for the interests of justice that a fact apparently of so doubtful a character as that which exists in the present case should not be investigated. Fortunately, the heiress-at-law does not represent the interest in the land, provided there was an intestacy : she had parted with it to a certain extent. If she had parted with it altogether, if she had, though heiress-at-law, ceased to occupy the position of heiress-at-law, by having invested others with the rights of heiress-at-law, she could not by her admission oust the other parties on whom she had conferred the right. She has, in fact, conferred her right on others ; she has by her marriage settlement endeavoured, at least, I do not say she has done it effectually, but she has endeavoured, on the face of the transaction, to transfer to others that which belonged to her. Then, it is said, all this is void ; that she was an infant when she married, and that an infant cannot bind her interest in real property though it is in consideration of marriage, and the marriage subsequently follows. But who is asserting that ? Who is setting up

this answer to the claim which the bill admits to the extent, at least, of making those who claim under that marriage settlement parties to the cause? Why, the plaintiffs; and the plaintiffs have no right to be heard at all till they have shewn that they are what they represent themselves to be, namely, parties claiming an interest under the will. Whilst the will remains matter of doubt they have no clear title. They file a bill here asserting a certain right, and incidental to that right disputing the title of the trustee under the settlement. They cannot dispute the title of the trustee under the settlement until they have established their own right, because they have no right to bring the matter into question at all. They are premature; they cannot be heard to raise any question till they shew the Court they are plaintiffs in the cause, and that the ground on which their title stands is a good and valid ground. Then the question comes to be decided, have they or not shewn their title? and that at once comes to the question of the validity of the will. If there is no will, or if the will binding the property is not the act of a party competent to make the will, the plaintiffs have no right to come here. They may never get so far in the cause as to inquire what defendants there are, who, in that case might or might not have a right to dispute their title. The plaintiffs cannot challenge the right of the defendant to be heard till they have established their own case. That is preliminary, and they have not established their title. Who questions their right? The heiress-at-law cannot, on account of this forfeiture, but there are other parties in the cause who can, because there are those who stand on her title, not exposed to the consequences of the forfeiture, and it is their bounden duty, before they are put to shew what right they have to the property under the marriage articles, to resist everything which may impeach that title, which by the duty they have undertaken of trustees, they are bound to protect. They say, "we do not admit the will; you, the plaintiffs, cannot say we are not necessary parties here, because you have made us parties as having an interest in the question, and if we are, the Court cannot assume you, the plaintiffs, have a title under the will until you have esta-

blished it." There cannot be a question, therefore, that the trustee under the settlement has a right to call in question the title of the plaintiffs, and to challenge them to shew that they have such a right and interest as they allege upon the pleadings they have, namely, that they have a will which takes away all such claim as the trustee has under the title of the heiress-at-law.

Therefore, it appears to me, whatever invalidity there may ultimately prove to be in the title of the trustee under the settlement, or those who claim an interest under the settlement, on the ground of infancy of the wife at the time of the marriage, that is a question which cannot be raised till the plaintiffs have shewn they are persons claiming under the will. It is competent to them to put the plaintiffs to the proof of their title. How is the proof of the title of a party claiming under a will? Simply *devisavit vel non*. The sole question is not as to the form; it is not disputed that that is the regular course; the only dispute raised is, whether the party defendant who raises that question is a competent party to ask the Court to try it. Can there be a doubt about it? If the plaintiffs have a right to be considered as trustees under the will, without any proof, then the trustee of the settlement is deprived of whatever right he may have. Instead of being a title open to dispute, it might have been a title perfectly free from all dispute if the heiress-at-law had been adult at the time. Still that does not deprive the testator of the power of interposing by his will, and depriving the heiress-at-law of that which she might have expected. Could it be said, in that case, that this defendant would not have a right to say, "Although I claim under a document giving me a clear title on behalf of other persons, unless you are able to dispute it, I raise the question whether the testator did or not make that will"? The effect of which would be to take away from the heiress-at-law that which she has been dealing with, and which, if the plaintiffs are right, would be the means of depriving the *cestui que trust* of the benefit of the settlement which was executed upon the marriage.

It does not appear to me there is really

any question but that the defendants are entitled to call on the plaintiff to prove his title, and that the only way in which a title of this sort can be proved is by the issue which the Vice Chancellor has directed.

Then comes the present appellant, not the plaintiffs, for the plaintiffs are not disputing, as appellants at least, that this is the right course to be pursued, and that they must establish their title before they can ask the Court to do any thing as between themselves and the defendant; but the person entitled to the first estate of inheritance under the will comes and says, "you are now going to raise a question about the will, and the testator, or at least the person who is supposed to be testator, has done all he can (or it has been done, I should rather say, by the instrument to which his name is appended) to prevent any question being raised by the will, and you are impeaching the testator's intention." I do not enter into the subject of what might be the result if there was no other interest on the record, but if there be an interest on the record which the plaintiffs cannot dispute, the plaintiffs having brought the defendant before the Court in respect of such interest, and it being clear that he is a party to the record in respect of such interest, the plaintiffs cannot say they are not bound to prove their title as against such defendant. They have come here for the purpose; they ask the Court to establish the will as against all persons claiming under the heirship, and this is one of those persons. We are now rehearing the cause: I am hearing the plaintiffs' case. The defendant, claiming under the settlement says, "I dispute your title as claiming under the will." Are not the plaintiffs to prove their title? That is not disputed. But then they say, "Oh, but it is proved in the cause." A question of this sort is never proved in the cause. If it were proved in the cause, if the privilege of asking an issue were confined to the heir-at-law alone, and not to those claiming through the heir-at-law, it would often be difficult to establish a case, because when an heir-at-law parts with his interest, he parts with all benefit under that interest. That question, however, does not arise here, because

even if this Court were to look at the evidence, as it would on any other matter of fact arising between plaintiff and defendant, is not this a case above all others in which the Court would require the assistance of a jury to be sure that it came to the right conclusion as to the fact?

Is there nothing of suspicion in this case, so as to make it the duty of the Court to ascertain the facts far beyond what may arise upon any deposition in this Court? Therefore, it is quite immaterial to consider whether the defendant is or is not armed with the authority of the heir-at-law in demanding an issue, because if that were overcome, it would be difficult for the Court to say it would not be doing the rashest thing possible in acting on evidence in this case, in which the party principally interested in disputing that evidence is precluded, by the insertion of the condition, from giving any evidence to meet it. Whatever, therefore, may be the right of the parties to demand an issue, this is a case in which, as a matter of discretion, the Court would think it necessary to adopt that course. Now, what has the Vice Chancellor done? Why, he has simply done that. He finds the defendant, the heiress-at-law, disarmed; he finds a party not disarmed, but entitled to call on the plaintiffs to prove their case. Then comes the question, how is that proof to be had? Why, according to the ordinary course of the Court on a matter of suspicion and doubt, not on the depositions taken in equity, but upon the result of an inquiry at law, by an issue *devisavit vel non*.

I think, therefore, that the Vice Chancellor's decree was entirely right, and I should have been very sorry indeed if means had not existed by which, under the circumstances as they appear here, an opportunity could be afforded to the Court of ascertaining beyond all question what the real history of this most mysterious and suspicious transaction, as it appears to me, really is. It may be all right; it may turn out to be all correct; but the insertion of that penalty undoubtedly leads to a strong necessity of having it fully investigated. If there were nothing else, the mere fact of a will being executed by a party under a commission of lunacy would make it difficult for the Court to act upon it without

better inquiry than can result from the mode of investigating facts in this Court.

It appears to me beyond all question that the Vice Chancellor's decree is correct. It is correct in substance beyond all doubt, and if it could be impeached at all, it could only be upon some technical and artificial ground. However, none exist when the thing is inquired into, none in point of form, none in point of rule or practice, and therefore the decree must be affirmed.

The only point that occurs to me, and that is not one with which the appellant or the plaintiffs have anything to do, is, whether the decree as it stands sufficiently protects the heiress-at-law. It does not appear at all upon the order by whom or at whose suggestion this issue is directed. The heiress-at-law is in that difficult position, that if she had demanded it, that is to say, if she, in the terms of the will, had done anything to impede the execution of the will, a question might arise how far she had or not incurred the penalty, and the Court is anxious to protect her as far as possible against any such question being raised. She is kept perfectly safe as far as appears at present from being exposed to such a question, and it is very desirable to preserve her in future proceedings from that condition. It appears to me the decree would be safer if it had stated that she had not demanded the issue, or that it was demanded on behalf of the trustee under the settlement. It is upon the fact of the trustee of the covenant disputing the validity of the will that the Court directs the issue, and that is free from all question under the forfeiture. I think it very much safer to introduce some words as a guard. The Vice Chancellor thought, as is very true, that it is safe enough without it; but I think it safer with it.

K. BRUCE, V.C. } WOODBURN v. WOOD-
Jan. 19. } BURNE.

Will—Construction—Vesting—“In case of death without leaving issue.”

*M. H., by her will, gave to trustees the sum of 3,000*l.* upon trust to pay the interest thereof for the maintenance of A, and to pay*

him the principal when he should attain twenty-one; but directed that in case he should die before his legacy should be payable, leaving lawful issue, such issue should take their deceased parent's legacy. She then gave one moiety of the residue of her estate upon trust for W. for her life, and, after the death of W, she gave this moiety to A. at the time his other legacy became payable, and in case of his death without leaving lawful issue, then the same to be equally divided between B, C. and D. A. survived the testatrix, attained twenty-one, and died in the lifetime of W. without ever having been married:—Held, that the share of the residue had vested in him absolutely, and did not go over to B, C. and D.

Margaret Hall, by her will, dated the 31st of December 1831, bequeathed all her personal estate unto B. Jopson and J. Carter, upon trust to pay her debts and the legacies therein mentioned, and then to place out at interest the sum of 3,000*l.* and “to pay the interest thereof for the maintenance and education of Myles W. H. Woodburne,” and also to place out at interest the other sums therein mentioned for the maintenance and education of the persons therein named, and directed that “when the said legatees should respectively attain the age of twenty-one years the said trustees should pay to them the principal sums above mentioned.” The will then contained a declaration that “in case any of the said legatees should happen to die before his or her legacy should become due or payable leaving lawful issue, such issue should be entitled to their deceased parent's legacy in the same manner as such parent, if living, would have been entitled thereto.” The will then proceeded as follows:—“And as for and concerning the rest, residue and remainder of my personal estate, I direct the said B. Jopson and J. Carter to place the same out at interest, and to pay one moiety or half part of the interest thereof to the said Margaret Woodburne during her life, and that after the death of the said Margaret Woodburne, one moiety or half part of the principal shall be paid to the said Myles W. H. Woodburne at the time when his other legacy becomes due and payable for his own absolute use and benefit; and in case of his death without

leaving lawful issue, then the same to be equally divided between his sister, Jane Hall Woodburne, and his brothers, George Woodburne and Thomas Woodburne.

The testatrix died in 1832. Myles W. H. Woodburne attained his majority in 1844, but died in the lifetime of Margaret Woodburne, the tenant for life of the residue, without ever having been married. Myles W. H. Woodburne, by his will, devised all his real and personal estate to his brothers and sisters and their children. Jane Hall Woodburne survived Mrs. Hall and married Mr. Cunliffe, and afterwards died.

The bill was filed by Sarah Woodburne, one of the sisters of Myles W. H. Woodburne, against the trustees of the will of Margaret Hall and the persons entitled under that will, and also against the executors and the persons entitled under the will of Myles W. H. Woodburne. The bill stated that the personal estate of Myles W. H. Woodburne, other than his interest under Margaret Hall's will, was insufficient for the payment of his debts; and charged that before his estate could be properly administered, it would be necessary to ascertain whether the interest in the residuary estate of Margaret Hall given by her will to Myles W. H. Woodburne had vested in him absolutely, or had gone over to his brothers and sister in the will named; and prayed that it might be declared that such interest had so vested in him, and for the general administration of his estate.

Mr. Russell, Mr. Rudall, and Mr. Cairns, for the plaintiff, and other persons in the same interest, contended that such interest had vested in Myles W. H. Woodburne, and cited *Leeming v. Sherratt* (1) and *Jones v. Jones* (2).

Mr. Torriano, for the representatives of Mrs. Cunliffe, contended that, in the events which had happened, the share of the residuary estate had gone over to Mrs. Cunliffe and George and Thomas Woodburne, and cited *Galland v. Leonard* (3).

Mr. B. L. Chapman, for the other parties.

(1) 2 Hare, 14; s. c. 11 Law J. Rep. (N.S.) Chanc. 423.

(2) 13 Sim. 561; s. c. 13 Law J. Rep. (N.S.) Chanc. 16.

(3) 1 Swan. 161.

KNIGHT BRUCE, V.C.—I am not sure that there is any precedent exactly governing this case. This arises from the circumstance that there is a legacy, in which a contingent interest is given to the issue of the legatee, in the event of his dying under twenty-one, and a gift of the residue to the same person, in which no contingent interest was given to such issue. Looking at the whole of the will and the spirit of it, I think that, in this particular case, the legatee, having survived the testatrix, and attained his majority, although he has since died in the lifetime of the tenant for life without leaving any issue, did not lose his share of the residue. In the admitted state of circumstances, I think that this interest is in the personal representatives of Myles W. H. Woodburne subject to the life estate of Mrs. Woodburne.

L.C. { *In re BLOYE'S TRUST,*
Nov. 8, 9, 10. { *Ex parte LEWIS.*

Trustee—Annuitant with Power of Sale
—*Agent purchasing for himself*—10 & 11
Vict. c. 96.

An annuitant, with power of sale over property on which the annuity was secured, employed A. & B. as her solicitors to sell the property by auction; and A. & B. procured the consent in writing of the grantor to the sale. The purchaser at the auction declining to complete on the ground of defect of title, A. & B. subsequently obtained from the grantor an assignment of the property to a trustee for themselves at the same price that it brought at the auction, but without disclosing to the grantor certain facts, and that they were purchasing for themselves:—Held, that A. & B. were the agents as well for the grantor as for the annuitant; and, as such, were under all the disabilities of an agent purchasing for himself; and the Court declared the assignment invalid.

An annuitant, selling under a power of sale, is a trustee, as regards the sale, for the grantor; and the agent for sale of such annuitant is, equally with his principal, affected with all the disabilities attaching to a trustee purchasing for himself.

Where money is paid into court by trustees under the 10 & 11 Vict. c. 96, the Court

may either adjudicate upon the matter upon petition and affidavits, or may direct a bill to be filed if the complexity of the case require a more formal proceeding.

William Mitchell Bloye being entitled, under the will of his uncle, Francis Bloye, to one-fifth share of the residuary estate of the testator, subject to the life interest of Robert Bloye therein, by a deed dated the 6th of April 1840, in consideration of 600*l.*, granted to Elizabeth Pratt, her executors, &c. during the joint lives of Elizabeth Pratt and three other persons therein named, and the lives and life of the survivors and survivor of them, an annuity of 42*l.*, and by the same deed assigned to E. Pratt his one-fifth share under the said will; with provisions for the repurchase of the said annuity, and with certain powers to E. Pratt for sale of the said reversionary interest in case of default in payment of the annuity. W. M. Bloye died on the 4th of June 1840, and by his will, dated the 13th of February 1840, appointed his wife Ann Susanna Bloye (who afterwards intermarried with one James Hillman) and R. Sewell, executors and trustees of his said will; and thereby, after giving a legacy of 200*l.* to his wife, he bequeathed all the residue of his personal estate to his wife and R. Sewell, upon certain trusts for the benefit of his five children. The will was proved by his widow alone, R. Sewell having renounced probate, E. Pratt, the annuitant, died on the 15th of January 1841, intestate. By deed dated the 27th of November 1846, and made between G. Woodman, as administratrix of E. Pratt, of the first part, James Hillman and Ann Susanna his wife, administratrix of W. M. Bloye, of the second part, and William Lewis of the third part, in consideration of 900*l.* paid by W. Lewis, namely, 679*l.* 10*s.* to G. Woodman as such administratrix and by way of re-purchase of the said annuity, and 220*l.* 10*s.* to J. Hillman and his wife, G. Woodman, as such administratrix, at the request of J. Hillman and his wife, assigned, and J. Hillman and his wife, in right of his wife as such administratrix, assigned and confirmed to W. Lewis, absolutely, the said one-fifth part to which W. M. Bloye was entitled in reversion under the will of the said Francis Bloye.

Robert Bloye, the tenant for life, died, and on his death Trundle and Lake the surviving trustees of Francis Bloye's will, under the 10 & 11 Vict. c. 96, paid into court to the credit of "The matter of the trusts of Bloye's estate, the share of W. M. Bloye," the sum of 1,770*l.* 1*s.* 9*d.*, as and for one-fifth share of the testator's residuary estate. In February 1849 W. Lewis and W. Overton & D. Hughes presented a petition for payment of the fund out of court to them, Messrs. Overton & Hughes claiming title to the fund under the deed of the 27th of November 1846, and alleging that W. Lewis was a trustee for them.

The petition, after setting out the above facts, stated that in 1846, the annuity having fallen considerably into arrear, Georgina Woodman as administratrix of E. Pratt, under the powers of sale contained in the deed of the 6th of April 1840, caused the one-fifth share of W. Mitchell Bloye, with the concurrence of Ann Susanna Hillman, to be put up to sale by public auction on the 19th of December 1846, when one Barker was declared the purchaser at the sum of 900*l.* That in the conditions of sale it was stated, that the sale was by the order of the administratrix of an annuitant under a power of sale in the annuity deed; and that Messrs. Overton & Hughes were named as the solicitors of the vendors. That at the foot of one of the particulars of sale was a consent in writing to such sale, signed by Ann Susanna Hillman, in the words following:—"To Messrs. Turner & Atherton.—I do hereby, as executrix of the late W. M. Bloye, deceased, authorize you to sell the reversionary interest referred to in this particular, for not less than 900*l.*; and when sold, I hereby agree out of the purchase-money, and in consideration of the vendor G. Woodman, administratrix of E. Pratt the annuitant, consenting to the sale thereof at the said sum of 900*l.*, to redeem the annuity above referred to, upon the understanding that the balance of the purchase-money of the above-mentioned property, after payment of your and all other charges, be paid over to me as such executrix. Dated this 17th day of September 1846."

That Barker took some objections to the title, and that Messrs. Overton & Hughes wishing to avoid the expense of a

suit for specific performance, paid him back his deposit, with interest and costs. That Messrs. Overton & Hughes then agreed to purchase the reversion on their joint account, at the price of 900*l.*, and to take an assignment thereof to the petitioner, Lewis, as a trustee for them; and that Ann Susanna Hillman was apprised of and consented to such arrangement. That the deed of the 27th of November 1846 was then executed; and on the death of the tenant for life, the petitioner, Lewis, applied to the surviving trustees, Trundle and Lake, to pay over to him the said one fifth share of the residuary estate; but that they declined so to do, on the ground of inadequacy of consideration; and that the trustees had since paid the same into court.

The respondents were Mrs. Hillman and her husband and other parties claiming under the will of W. M. Bloye. By the affidavits filed in opposition it was alleged, that in 1846, the annuity being then in arrear, Mrs. Hillman, who was in poor circumstances, and whose present husband was an illiterate person, being unable to employ a solicitor, requested one Lay, a solicitor's clerk, to arrange with Messrs. Overton & Hughes as to the settlement of the arrears; that Messrs. Overton & Hughes thereupon proposed a sale of the said one-fifth share and a repurchase of the annuity; and Mrs. Hillman, believing the annuity to be valid, and that she could not resist the sale, gave her consent in writing; and that such written consent as aforesaid was prepared by Messrs. Overton & Hughes, and that she had no other professional advice. That some short time after the sale by auction, Messrs. Overton & Hughes applied to Mrs. Hillman to prove the will of her late husband; and on the 4th of November 1846, at the solicitation of a clerk of the said firm, she went, accompanied by the said clerk, to Doctors Commons and proved the will; and the probate thereof was immediately taken possession of by Messrs. Overton & Hughes, and had ever since remained in their hands; that at a subsequent interview Messrs. Overton & Hughes stated to Mrs. Hillman that objections had been taken to the title by Barker, but the nature of those objections were not specified, and Mr. Hughes ex-

pressed an opinion that the title was as good as could ordinarily be had in sales of similar property. That at the time of executing the deed of the 27th of November 1846 Mrs. Hillman supposed that it was a deed to carry into effect the sale by auction; and that the deed was never read over or explained to Mrs. Hillman or her husband before the execution thereof, either by Messrs. Overton & Hughes or by Lay; and that neither Mrs. Hillman nor her husband knew that Lewis or Messrs. Overton & Hughes were the purchasers until the present petition was presented; and that they did not discover that the annuity was void for want of a valid memorial until in the early part of the year 1849. That Mrs. Hillman had applied to Lay to make an affidavit of the circumstances relating to the several transactions within his knowledge, but that he had altogether declined to do so.

By the affidavits in answer filed on the part of the petitioners, it was alleged, that upon Barker's objecting to the title, Messrs. Overton & Hughes requested him to wait, as they thought they could cure the defect of the title; and that it was not until after he had finally refused to complete the purchase that they determined themselves to become the purchasers; and that they communicated that fact to Mrs. Hillman before the execution of the deed; that, previously thereto, a valuation of the reversionary interest had been made by two actuaries, amounting respectively to the sums of 1,025*l.* and 1,063*l.* It appeared also that the property had been valued by Mr. Morgan, the actuary on the part of the respondents, at 1,212*l.*

The petition came on to be heard, before the Vice Chancellor of England, on the 2nd of March 1849, when, the respondents submitting to be bound by the order made upon the petition in the same way as if a cross petition had been presented by the respondents, an order was made that it should be referred to the Master to tax the costs of the trustees, Trundle and Lake, and that such costs, when taxed, should be paid out of the fund in court; and that the residue of such fund should be paid to the petitioner, Hughes, with the usual directions.

The respondents then presented a peti-

tion for a rehearing, by way of appeal before the Lord Chancellor.

Pending the appeal, on the 23rd of March 1849, the petitioner, Hughes, obtained payment of the fund out of court after deducting 12*l.* 5*s.* 1*d.*, the amount of the taxed costs of the trustees.

The petition coming on for rehearing,

Mr. Bethell and *Mr. Rogers*, for the appellants, contended that Overton & Hughes throughout the transactions had acted as the solicitors of Mrs. Hillman, and, as such, were under an obligation to inform her that the annuity deed was void ; and that she was only bound to repay the purchase-money, with interest at 4*l.* per cent., after taking credit for the sums paid by the grantor ; and that the concealment of this fact, and also of the fact that they themselves were the purchasers from their own client, was a sufficient ground for annulling the deed of the 27th of November 1846.

Mr. Stuart and *Mr. Lovell*, *contra*.

Nov. 10.—THE LORD CHANCELLOR.—A careful perusal of the affidavits and documents in this case has only served to confirm the impression I entertained at the hearing. The Vice Chancellor seems to have assumed that this question turned upon its being a purchase of a reversionary interest, and therefore he proceeded to inquire into the price given ; but the view that I take of this case makes that question quite immaterial ; but at the same time I must observe, that if it were necessary to shew adequacy of consideration, I think the parties have entirely failed in proving that proposition. But it is unnecessary that I should deal with that question, for if it had been a purchase of an interest in possession, instead of a reversionary interest, the conclusion to which I have come would have been precisely the same. Now, the facts of the case, except upon one or two points, are very short and simple. A person, being entitled to an interest in certain property, grants an annuity, with a power of sale over the property, for the purpose of answering any arrears that might arise from default in payment of the annuity. The grantor dies, and his interest is represented by his

administratrix. The power of sale being only for the purpose of securing what might be due upon the annuity, whatever surplus might arise upon a sale would belong to the grantor of the annuity ; the security not being a mortgage, but a charge or incumbrance on the property ; which was liable, therefore, in the first instance, to payment of the charge, and subject thereto, the surplus would belong to the original owner. Now, it is quite clear that, in the first instance, the intention was to sell under the power in the annuity deed ; the particulars and conditions of sale on the face of them shew that. Without any question, Messrs. Overton & Hughes were the solicitors and agents of the annuitant or her representative for the purpose of effecting this sale ; they have the conduct of the sale ; they appoint the auctioneer. But before the sale took place, it very naturally occurred to them, that the concurrence of the personal representative of the grantor in the sale would probably much facilitate the sale, and render it more advantageous. On the 17th of December, therefore, we find a written memorandum on the conditions of sale, by which the person entitled to become such personal representative, and who afterwards became so, agrees to join in the sale ; and that memorandum is most important in the consideration of the present case. That memorandum was procured from her by Messrs. Overton & Hughes ; and no complaint can be made that the owner of a fund subject to a charge should join in the sale with an incumbrancer having power to sell. Having then procured her concurrence in the character of executrix, Messrs. Overton & Hughes, after the auction and in prosecution of the same plan, took steps for investing her with the character of executrix which she had so assumed. They take her to Doctors Commons, they prepare the necessary affidavit, for the purpose of investing her with the authority she had assumed at the sale.

Now, what was the sale which took place under these printed particulars, with the addition of this authority or agreement ? It was a sale of the whole interest discharged, in fact, from the incumbrance ; as between the grantor and grantee of the charge or their respective representatives,

it had been agreed in what manner and proportions the fund was to be applied and divided for the purpose of paying off the charge, and paying the surplus to the representative of the grantor; but, as between the vendor and purchaser, it was the sale of the two interests by a joint authority given to the auctioneers through the intervention of Messrs. Overton & Hughes. These facts being ascertained, how is it possible to say, that Messrs. Overton & Hughes were not the agents of the grantor for the purposes of the sale? They were the agents for sale under the joint authority of the grantor and the grantee. Being then such agents for sale; it is not and it cannot for a moment be contended that they could become purchasers: at least, not without full explanation to the parties interested, and putting them into possession of all the facts within their own knowledge, and especially the fact that they were to become purchasers themselves. I do not say to what extent parties may or may not deal with property as to which they know all the facts; but, beyond all question agents and solicitors could not surreptitiously, that is, without the knowledge of their principals, become purchasers. The decision in *Woodhouse v. Meredith* (1) precludes all questions upon that point. But supposing it to be a sale merely by the annuitant under the power of sale. A party who proceeds under a power of sale is a trustee for that sale: he is not selling only for himself, but also for those to whom the property belongs: after satisfaction of his own charge, he is a trustee of the surplus and bound to account for it. If then Messrs. Overton & Hughes were simply the agents of the annuitant, and the annuitant, being the trustee for sale, was incapacitated from selling to himself, how can the agent do that which his principal is incapacitated from doing? The question arose (and I am not aware that it has ever been the subject of decision) as matter of observation by Lord Eldon in the case of *Downes v. Grazebrook* (2). There Lord Eldon laid it down, not as a new proposition, but as a necessary result of the doctrine of the Court, that an incum-

brancer with a power of sale was, in the first instance, a trustee for sale, and being such was affected with all the disability of purchasing attaching to any other trustee. That case did not call for any other decision; but Lord Eldon alludes to the fact of an attorney purchasing, and he asks a question in the way in which those, who were familiar with the mode of Lord Eldon putting a question of that sort, well knew what answer he would have given if he had been called upon to answer it, whether the attorney could do that which his principal could not? Whether a party, incapacitated from purchasing can employ an agent to do that which he could not do himself? And whether that agent had a power to purchase which his principal had not? The distinction would be most absurd. Why is a trustee not permitted to purchase? A trustee for sale is bound to get the best price for the property to be sold that he can; but, as purchaser, he is interested in getting the property at the lowest price he can. The Court, therefore, will not allow a party to put himself in a situation where his interest conflicts with his duty. Now, practically, the agent is the party who conducts the sale. In ninety-nine cases out of a hundred the principal merely directs the sale, and then takes no further part in it; but the solicitor, or auctioneer, or whoever the agent may be, has the conduct of the sale, and is the party on whose exertions the result of the sale is to depend; therefore, it would be an absurd distinction to say, though the principal is incapacitated, the agent is not; the reason of the rule applying much more forcibly to the agent than to the principal. I am clearly of opinion that the sale was on behalf of Mrs. Hillman, who was one of the vendors; but if that were not so, the sale unquestionably was on behalf of the annuitant, whose solicitors and agents Messrs. Overton & Hughes were. Now, these solicitors ultimately became the purchasers. Barker, who had become the purchaser, objected to the title, and was desirous of being off. Messrs. Overton & Hughes requested him to wait a little, to see if they could obviate his objection. Why, if they intended to purchase for themselves, they did not take advantage of Barker's

(1) 1 J. & W. 205.

(2) 3 Mer. 200.

desire to be off, is not very easy to be explained, and that is the only part of the case upon the evidence that remains in obscurity; namely, why they should be anxious to get Barker to complete, if they thought they might become the purchasers of a property at the sum of 900*l.*, which was worth more than that sum? However, that does not touch the merits of the case between them and Mrs. Hillman. Then, having obtained from the purchaser his relinquishment of the purchase, they say, that then, and not till then, did they determine and agree among themselves to become the purchasers of the property for 900*l.* They say that this fact was communicated by them to Mrs. Hillman, and that she, with the advice of Lay, concurred. Now, if I could give credit to that statement, it would be a matter on which the transaction would in a great measure turn; but they do not say how the communication was made. Was it in writing, or by word of mouth, or through the intervention of Lay? We are not told how it was made. Mrs. Hillman positively denies that it was ever or in any way made. If it was oath against oath I could not act upon it, at least, in affirmance of their statement; but what took place when the parties met to execute the deed (as appears from Mrs. Hillman's affidavit, which Messrs. Overton & Hughes have used, and therefore must abide by) shews a state of things inconsistent with the fact of their having communicated to her their intention of becoming purchasers themselves: for they told her that the property was still for sale. That shews that the communication alleged by the petitioners did not take place, and in terms negatives the case they have made at the bar. Now, I think, enough has been said, and I am unwilling to say more than is necessary for disposing of this case; but looking at the fact that, according to my view, Messrs. Overton & Hughes were not in a situation to become purchasers without a full disclosure of all the circumstances relating to the property and the evidence of its value, and looking at the reasons on which I totally disregard their statement that they had communicated the fact to Mrs. Hillman, and that after full explanation she agreed to deal with them as purchasers;

and also at the deed which they prepared and tendered for her execution, I think their whole case is negatived. If all was known and agreed upon, why was such a deed prepared? A true recital of the transaction in the deed would have bettered their title,—at least the case would have been free from the imputation of suppression. But the deed recites Lewis as the purchaser, without any allusion to themselves as the parties beneficially interested. When I look therefore at the deed, at Mrs. Hillman's evidence, at the conduct of the parties, I must consider the statement of Mrs. Hillman's knowledge and concurrence as altogether contrary to the fact. Here, then, we have the case of agents for sale, solicitors employed for the purpose of sale, surreptitiously, clandestinely, and by suppression and misrepresentation of facts, endeavouring to become purchasers for themselves, and obtaining a conveyance for themselves to an assignee apparently represented as the real purchaser. It is sufficient simply to state the proposition to shew that this transaction cannot stand for a moment in a court of equity: and if I had been able to collect these facts with that degree of certainty with which it is the duty of the Court to ascertain them, before it disposes of property, and more especially when the decision involves the conduct of the parties concerned in the transaction, many hours of this discussion might have been saved. The case, as I view it, is completely made out against these proposed purchasers; but the difficulty is as to the mode of carrying out the result. There is nothing in court but this petition. The parties, from a laudable motive of saving expense, have agreed that the question should be discussed and decided on this petition, which asks payment out of the fund. So far as the object of the petition goes, it is easy enough to deal with it. The petitioners have not made out their case, and therefore the money must be brought back into court. But that is not all; Mrs. Hillman is entitled to have something on the records of the Court to shew that the Court has by the consent of both parties adjudicated on the matter of right between them. That consent includes in it the consent that the

Court should make such an order as will meet that object. For that purpose I propose, in ordering the money back, to recite the grounds of my decision, and to declare that the deed under which the petitioners claim is a deed which the Court cannot act upon, and which ought to be set aside as between the petitioners and Mrs. Hillman. That would be the declaration if a bill had been filed for that purpose; and it is necessary that the record here should contain such a declaration in order to clear Mrs. Hillman's title of any question that may hereafter be raised on behalf of Messrs. Overton & Hughes. I think, therefore, that the prefacing the order with such a declaration, shewing the grounds on which the fund is ordered back, the decision to which I have come, and the relative situation of the parties, would meet the justice of the case. It will be quite open then for Messrs. Overton & Hughes to make such case as they can, as to the mode in which they have dealt with the incumbrance, on the supposition that they were to become the purchasers. That is a different matter; and, the fund being brought back into court, that question may be discussed either on the application of Mrs. Hillman for the fund, or on the application of the present petitioners on a different ground of title: and there will be liberty to them to make such application as they may be advised.

Now, one word as to the proceedings under this act of parliament. This act has been much complained of, as destroying the jurisdiction of the Court, and giving the Court the power of doing that, without an investigation of the merits, which could not have been done independently of the act. But all the act of parliament has done is, to facilitate the getting of the money into court. In many cases it saves the expense of a suit, the expense of appointing new trustees, and the dilatory and expensive proceedings of obtaining an order for the payment of the money into court upon the answer of the trustees. But the money being once in court, it is there subject to be dealt with as if brought in in any other way. If there were matter of great doubt or difficulty the Court would direct a bill to be filed; but, if it were a matter which the Court could safely dispose of on petition, the Court would so

deal with it in order to save the expense of a suit. The machinery by which the money comes into court makes no difference; the mode of adjudicating upon the rights of the parties remains the same. In the present case, however desirable it may be as between individuals to save expense, it is to be regretted that the Court has to deal with it without any counter proceeding even by way of cross petition.

This course has been adopted by the parties to save expense; but if the Court permits that course to be adopted too readily, a very loose mode of proceeding may be introduced, injurious to the practice of the Court. I would much rather have had to dispose of this question in a suit, and more especially as this petition does not directly raise the question whether Mrs. Hillman is entitled to have the deed set aside. But, nevertheless, the parties, have, by consent, given the Court jurisdiction, though I doubt much whether it is generally safe where questions of this sort are raised, to adjudicate upon a state of circumstances dependent upon affidavits. You have, indeed, the evidence of both parties, telling their own story, from which you may perhaps be able to draw a tolerably safe conclusion; but the great defect of this mode of proceeding is the want of power to compel the testimony of an unwilling witness. And this very difficulty has arisen here in the case of Lay, who has refused to make an affidavit on the part of Mrs. Hillman. But taking the case out of the mouths of the parties themselves, I think it hardly probable that the petitioners would be able to mend their case by further evidence. That removes any anxiety as to a miscarriage in consequence of my having adopted the course of proceeding which the parties have chosen for themselves. The order will be to reverse the order of the Vice Chancellor, and dismiss the petition, with costs, declare the deed of the 27th of November 1846 invalid as an assignment of the appellants' reversionary interest to the petitioners; and order the repayment of the fund into court; the same not to be paid out again without notice to the petitioners; and all parties to be at liberty to make such application as they may be advised.

L.C. }
 April 27, 28; } *In re BROWN.*
 May 4. }

Lunacy—Committee, Removal of— Unintentional Mismanagement of Estate — Practice—13th Order in Lunacy of October 1842—Attendance of Infant Heir without legal Guardian.

The residence of a committee at a great distance from the lunatic and his estate is not per se a disqualification for the office.

The 13th General Order in Lunacy of October 1842 enables the Master to institute inquiries and report thereon without a previous order of reference for that purpose; but such report requires the sanction of the Great Seal before it can be acted upon.

Where the committees of a lunatic, acting with the sanction of the Master, but (by mistake) without the authority of the Great Seal, had expended large sums in improving the estate, and had done other acts of an important character, the Court refused to discharge the committees, or to direct a reference at their cost to inquire as to the propriety of such acts, no mala fides being shewn, and no improper items being pointed out in the accounts which had been passed by the Master.

In proceedings in Lunacy, the attendance of the heir-at-law is required, not for the protection of his own interest, but for the protection of the lunatic.

Where an infant heiress-at-law, residing with her mother, a widow, was represented before the Master by her mother's solicitor, and the accounts had been regularly passed, the Court refused, on the petition of the heiress-at-law, to re-open the accounts on the sole objection, that the heiress at the time of passing such accounts had no legal guardian appointed.

This was a petition presented by Elizabeth Caroline Brown, an infant, the heiress at-law and sole next-of-kin of the lunatic John Brown, by Elizabeth Mary Heselton, her mother, in the petition described as "her guardian appointed by the High Court of Chancery"; and it prayed that R. H. Jones and S. H. Thompson, the committees appointed under the lunacy of the person and estate, might be discharged

from their offices, and for a reference to the Master to appoint other fit and proper persons as committees of the person and estate of the lunatic, and to approve of a scheme for the future management of the lunatic and his estate; and that the Master's reports on the first, second, third and fourth accounts in the petition mentioned might be taken off the file; and that the accounts for the years 1843, 1844, 1845 and 1846, might be re-opened and re-passed before the petitioner; and that the costs of this application and consequent thereon might be paid by the two committees.

*It appeared that in the year 1828, the lunatic J. Brown had been placed by his father W. Brown in a private establishment near York. W. Brown the father died in 1838, possessed of considerable real and personal estate, and by his will dated in 1833, he devised and bequeathed his real and personal property upon certain trusts for the benefit of his two only children, C. E. Brown and J. Brown, the lunatic; and, referring to the incapacity of his son J. Brown, he appointed R. H. Jones and S. H. Thompson, the executors and trustees of his will, the guardians of J. Brown and of his estate. C. E. Brown died in October 1838, leaving an only child, the petitioner, who was the heiress-at-law and sole next-of-kin of J. Brown, and was then of the age of five years or thereabouts, and his wife E. M. Brown, who, in April 1846, intermarried with J. Heselton. In 1839 a commission of lunacy was issued against J. Brown upon the petition of E. M. Brown; under which J. Brown was found to have been of unsound mind since the 1st of August 1828. Upon that proceeding Mr. Wood was the solicitor employed by E. M. Brown and also by Jones and Thompson. By an order of the Lord Chancellor, made in the lunacy in February 1840, on the joint petition of E. M. Brown, and Jones and Thompson, the two latter persons were appointed committees of the person and estate of the lunatic. By the report of the Master in Lunacy, dated in 1842, it was found that the clear income of the estate of the lunatic for the year ending 1840 was 1,300*l.*; that 460*l.* would be a proper*

annual sum for his maintenance; and that a certain other sum should be allowed for the purchase of a carriage, &c. for his use; and that it would be proper that he should occasionally be allowed to go on a visit to Scarborough or Harrowgate, or to his own estate at Ormsby. That report was confirmed by the Lord Chancellor; and it was ordered that the committees in passing their accounts should be allowed a sum, not exceeding 100*l.* annually, for the purposes of such visits. On the 4th of May 1846, being shortly after the marriage of E. M. Brown with Mr. Heselton, a bill was filed, on behalf of the petitioner, by R. H. Jones, as her next friend, seeking amongst other things the appointment of a guardian to the petitioner; and after some contest, Mrs. Heselton, the mother, was appointed guardian. The petition alleged various acts of misconduct and irregularity, and extravagant and unauthorized expenditure on the part of the committees as ground for their removal and for opening the accounts; as that the committees, who were bankers at Liverpool, resided 100 miles from the lunatic's estates, and seldom visited the lunatic; that they had appointed a person of the name of Taylor, who resided at a distance of 146 miles, at a salary of 100*l.* a-year to manage the estates and collect the rents; that they had expended large sums of money in establishing a tilery upon the estates, and in draining, and had paid a sum of 50*l.* a-year to a resident manager of these works; that they had cut down timber to a great extent, and had consented to an act of parliament authorizing a railway to pass through the estates, and had sold some part of the estate for the purposes of the railway; and that all these acts had been done without the sanction of the Lord Chancellor; and that the lunatic had never been taken to Scarborough or any other place for his amusement since the date of the order in 1842; that neither the petitioner nor her guardian had ever been consulted, as to the management of the lunatic's property, down to the year 1847; and that on the taking of the accounts before the Master, Mr. Wood, the solicitor, had represented himself as appearing for the petitioner without authority.

From the evidence of the respondents

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it appeared, that the acts of the committees complained of in the management of the estates, were, in every instance, done with the sanction of the Master, and had proved beneficial to the estate; and that the committees never understood from the Master, or were aware, that it was necessary for them to obtain the sanction of the Lord Chancellor before acting upon the Master's report; and that the physician attending upon the lunatic had advised that it would not be beneficial to him to be taken to Scarborough or other places of amusement. It was proved also that Mr. Wood had, on several occasions from 1838 to 1846, acted as the solicitor of Mrs. Heselton, the mother, as well in regard to her private affairs as in the lunacy; and that the petitioner had always resided with her mother.

Mr. Bethell, Mr. Rolt, and Mr. Follett, for the petitioner, contended that, assuming that the acts of the committees were excusable, on the ground that they had the sanction of the Master, yet that they required the sanction of the Lord Chancellor to justify them. On this ground, and also on the ground that the infant heiress, who was the only person interested in checking the accounts, was not represented before the Master, the accounts must be reopened and repassed, at the expense of the committees; that the distant residence of the committees disqualified them from exercising personal care and attention towards the lunatic; and that they had neglected their duty in that respect, by not allowing him to enjoy the benefits provided for his amusement by the order of 1842.

Mr. Roundell Palmer and Mr. Prior, for the respondents.—No legal or testamentary guardian of the infant existing, the committees were justified in presuming that Mr. Wood properly represented her under the authority of the mother, for whom he had acted throughout as her solicitor; that as to the management of the estate, it had proved to have been beneficial, and was done under competent advice and with the sanction of the Master, and that the only thing that could be alleged against the committees was, that they were ignorant of the practice of this court; that the distance of their residence would not disqualify them for their office, as they were

persons of the highest character, and had been appointed by the father's will as guardians of the lunatic.

Mr. Bethell replied.

May 4.—The LORD CHANCELLOR.—The most important part of this case, as far as concerns individuals, is that against the committees. By the father they were appointed executors and trustees of his will, and were by the Court appointed committees of the person and estate of the lunatic, with the approbation of Mrs. Heselton (then Brown), the mother of the heiress-at-law and sole next-of-kin. As against them nothing is proved in respect of corrupt conduct or malversation in their office; but, on the contrary, there has been an extremely judicious management of the estate, though accompanied with great irregularity of practice, for which, as I think, they are not responsible at all. But it is alleged that they are improper persons to be committees, because they reside at a distance from the estate; that, *per se*, is not a ground for their discharge. They were persons evidently high in the confidence of the family, and were appointed committees with the consent of the person, whom I must suppose to be the mover in this petition, and who puts herself forward by the description of "Elizabeth M. Heselton, her guardian appointed by the High Court of Chancery;" a very unnecessary description. But if they are not proper persons, am I to discharge committees with costs, as guilty of misconduct, because they are not resident near the estate? It might be ground for reference to the Master as to the propriety of the appointment, but certainly not for their discharge. It is not necessary to qualify a person to be the committee of landed estates that he should be an agriculturist or acquainted with all the details of the management of land. Here they employed a competent person to superintend the management of the estate, and also a sub-agent, both at certain annual salaries. That may or may not be a prudent management of the property; it may be attended with a greater measure of expense than is absolutely necessary; but the ground of the present application is the supposed misconduct of the committees. There is no proof of such

misconduct; but I find rather a very prudent and discreet management of the property. It is true that they had no authority to do what they had done; but the expenditure is such as any prudent proprietor of an estate would have made, namely, in thorough-draining the land under the inspection of a competent agent. As to the greater part of the transactions, I find by the affidavits and the memoranda that they were not only entertained but sanctioned by the Master. I cannot, under these circumstances, impute to the committees misconduct, because they were not better acquainted with the rules of the court as to the management of the lunatic's property. Mr. Wood, the solicitor, it is clear, had the sanction of the Master from first to last.

One other allegation is, that an act of parliament was obtained with the concurrence and consent of the committees, by which act the mode was regulated in which a railway company should pass through and acquire part of the lands. The committees were not authorized to do this: if they had done it wilfully, it would be misconduct; if ignorantly, much to be regretted. They laid the case before the Master and obtained his sanction to their giving assent to the act. I cannot, then, blame them for having acted under his sanction. It was said there was some General Order applicable to this case; but none was referred to except the 13th Order in Lunacy of the 27th of October 1842 (1). —[His Lordship read the Order.] A very distinct rule is there laid down. That provision was introduced to save the expense of applications quite of course, seeking references to the Master to make certain inquiries. The object was to save the expense of the first order; but after that order the Master, as to jurisdiction, was in precisely the same position as to authority as before. He could make the inquiry and report without special authority; but his report was to be the subject of an order of the Great Seal. It appears, however, that instead of acting upon this rule, the order has been misconstrued to mean, that the Master may take the whole direction of the lunatic's estate, and direct things to be done, such as a

(1) Ord. Can. 230; 12 Law J. Rep. (N.S.) Chanc. 8.

system of drainage and giving consent to acts of parliament; matters which may be right or wrong, but which are still matters of considerable importance.

In this state of things, am I to visit these persons as guilty of fraud by discharging them with costs? So far from thinking this to be the proper course, I am clearly of opinion that it is my duty to them and to all other persons under the necessity of coming here, to dismiss this petition with costs, so far as it imputes misconduct.

But there are other matters in this petition which do not fall under the same rule, and may be reached by this petition without putting the parties to any further expense. It appears under this state of things, that great alteration has been made in the estate without sufficient authority. I think, therefore, that on this petition it may well be referred to the Master to approve of a scheme for the future management of the property. Considerable sums have been expended in allowing salaries to the superintendents. I cannot sanction that without giving the Master an opportunity of examining in detail what is necessary for the future management of the estate. As to the mansion-house, the way in which that has been dealt with, does not appear to me to be a discreet management. The reference must be directed as to that part of the property also, for I have no facts before me to enable me to come to a satisfactory conclusion on the subject. There must, therefore, be a reference to the Master to approve of a scheme for the future management of the estate including the mansion-house.

With respect to the lunatic, I cannot, upon the facts before me now, conclude what is best to be done; but I cannot think that the manner in which he has been dealt with is right. He is possessed of a certain degree of sense, and a certain capacity for enjoyment; and yet he has been shut up in a lunatic asylum. He is entitled to all the comforts which he is capable of enjoying, with reference to the amount of his income. I think, therefore, there should be an inquiry as to a scheme for the future care and comfort of the lunatic.

Now, with regard to the accounts. If these monies had been expended without any sanction of the Court, I should have done as in other cases that have come

before me, namely, referred it to the Master to inquire whether the expenditure had been beneficial to the estate or not; and the party who rendered that inquiry necessary would have had to pay the costs of it, whatever might be the result; but how can I do that here when the whole expenditure has been sanctioned by the Master, and the parties were not aware they were guilty of irregularity?

One other irregularity is alleged which I cannot deal with in any shape. In this case there was an heiress-at-law, an infant, without any legal or testamentary guardian. Since the death of her father she has continued to reside with her mother, who employs her own solicitor. Then, it is said, that all these proceedings are to go for nothing, because no such guardian existed to protect her interest. That seems to assume that the heir and next-of-kin come here to protect their own interest; that is not so, but the Court requires their attendance to give information to the Court to enable it the better to protect the interests of the lunatic. If I were to lay down a rule that no infant heir-at-law could be brought before the Court without a testamentary or legal guardian, who is to pay the costs of that attendance? Not the lunatic's estate, for that would not be beneficial to the estate. How can I call upon the infant heir-at-law to bear the expense of procuring the appointment of a guardian for the purposes of this attendance? I asked what authority there was for that proposition, and I received no answer to the question. The same process does not exist in Lunacy, as when an infant is sued in this court, of appointing some person to protect the interest of the infant. Whatever may be the rule when the case occurs, the question here is, whether it is so clear that, the heiress-at-law having by her mother's attorney appeared before the Master, all the proceedings are void because the heiress-at-law had not a regular guardian appointed. In matters of lunacy, and under the circumstances of this case, I cannot treat the proceedings as a nullity, and set aside all the accounts, which I am asked to do, not on the ground that the heiress-at-law did not attend the Master, but because, so attending, she had no legal guardian appointed by the Court to protect

her interests. Then, it is said, the income has not been increased by the expenditure; but that is, because it has been expended under the sanction of the Master in improving the property. No man who lays out money in draining will find his income increased for the time; because the expenditure itself exhausts the income, but afterwards it is very productive. But there are no improper items pointed out; if such had been the case, it might have been ground for a special reference to the Master; but there is only a general inference of improper expenditure drawn from the supposed misconduct of the committees before the Master; but even if such items were pointed out, I should be reluctant to open the accounts upon accidental errors in the absence of actual fraud; especially where the petition is founded upon charges of gross misconduct, without, as far as I can see, any ground shewn for such charges. It is quite open to the parties if there are corrections to be made in the accounts, to bring such a case forward upon substantive grounds; but upon the present petition, connected as it is with charges of gross misconduct, and complaining of the accounts as consequential upon such misconduct, this is not a case for opening the accounts in the mode suggested; therefore I shall not make any order upon that part of the petition.

The petition must be dismissed with costs, so far as it impeaches the conduct of the trustees and seeks their discharge; and there must be a reference to the Master to inquire as to a proper scheme for the future management of the estate, including the mansion-house; and also as to a scheme for the future maintenance and management of the person of the lunatic.

WIGRAM, V.C. } GRIFFITH v. LUNELL.
Nov. 14, 15, 21; } GRIFFITH v. RICK-
Dec. 4, 5, 6, 7, 10, 20. } ETTS.

*Mortgage—Redemption Suit—Parties—
Conversion—Creditors' Deed, Revocation of.*

E. G. by deed conveyed all his real and personal estate (subject as to part of the real estate to a mortgage in fee from E. G. to a mortgagee then in possession) to trustees in trust to sell for the benefit of his creditors,

and to pay the surplus to himself, his executors, administrators and assigns. The trustees did not sell the mortgaged premises, nor complete the trusts for the creditors. E. G. filed a bill for redemption of the mortgaged estates, to which the trustees were not parties, nor was any mention made of the trust deed, but the suit did not proceed beyond the answers. E. G. died intestate, and the devisee of his heir-at-law filed a bill for redemption of the same estates, and claimed the benefit of E. G.'s suit:—Held, that the plaintiff was not entitled to redeem, because the real estate of E. G. had been converted by the deed of trust into personality, and had not been subsequently reconverted, nor had that deed been revoked by E. G.

Observations on revocation by author of deed for benefit of creditors.

By indentures of lease and release of the 5th and 6th of December 1800, Edmund Griffith, deceased, mortgaged to Richard Ricketts, deceased, in fee, certain hereditaments in the parishes of St. Philip and Jacob and St. George, in and near the city of Bristol, for securing 2,000*l.* and interest. In 1805 or 1810 the mortgagee entered into possession of the mortgaged premises, in consequence of the debt not having been satisfied, and in 1812 transferred and delivered possession of the greater part of them to Solomon Moore, but without the concurrence of the mortgagor. Ricketts died in June 1818, having by his will, dated the 14th of the preceding May and duly proved, appointed W. S. Lunell, R. Ricketts the younger and J. Leonard his executors. Solomon Moore died in 1823 intestate, leaving his only daughter Anne, the wife of J. L. Frost, his heiress-at-law, and she duly administered to his effects.

By indentures of lease and release of the 27th and 28th of July 1810, the release being stated to have been made between Edmund Griffith of the one part, and C. J. Harford and R. C. Wimpenny of the other part, after reciting that Isaac Cooke had on that day advanced to Edmund Griffith the sum of 563*l.* to answer his immediate occasions; and that the latter was indebted to several other persons in divers sums of money, and not being able to discharge

the whole of such debts had agreed to convey and assign all his real and personal estate unto and to the use of Harford and Winpenny, their heirs, executors, administrators and assigns (subject nevertheless to such mortgages or other charges and incumbrances as affected the same) in trust for the benefit of all his creditors, it was witnessed that, in pursuance and part performance of such agreement, and in order to raise and establish a fund for the payment of his debts, the said Edmund Griffith released and confirmed all his real estates, with the appurtenances, unto and to the use of Harford and Winpenny, their heirs and assigns; in trust, nevertheless, with all convenient speed to sell and dispose of the same either by public auction or private contract, with power to give receipts for the purchase-money, and to stand possessed of and interested in all and every the respective monies which should arise from such sale or sales, and also of the rents, issues, profits, produce and proceeds thereof in the mean time, in trust in the first place to pay and discharge the sum of 563*l.* to Isaac Cooke, and then to retain and reimburse themselves all costs, charges and expenses, &c. in and about the execution of the trusts, &c.; and upon further trust, by and out of the trust monies to pay and discharge all other the debts due from Edmund Griffith to any other persons, so far as the trust monies would extend, by an equal pound rate; and in case there should be any surplus of the trust monies, in trust, to pay the same unto Edmund Griffith, his executors, administrators and assigns, to and for his and their own absolute use and benefit. The deed contained the usual covenants on behalf of Edmund Griffith, to assist in the execution of the trusts and concur in the sale, not to revoke the deed, and for further assurance.

The trustees accepted the trusts but discontinued acting therein previously to the filing of the bill in the suit of *Griffith v. Lunell*, to which they were not made parties. The debt due to Mr. Cooke and one of 1,300*l.* to Mr. Harford, and other debts intended to be provided for by the above deed, had not yet been paid, nor had the trustees sold any part of the mortgaged premises. In February 1827 Ed-

mund Griffith commenced a suit (*Griffith v. Lunell*) for redemption of the premises against Lunell, Ricketts the younger (erroneously alleged in the bill to be the heir-at-law of Ricketts, the mortgagee), Leonard, and J. L. and Anne Frost. The bill in that suit did not make any mention of the creditors' deed of 1810. The defendants put in their answers and admitted the above facts respecting the mortgage and transfer and subsequent dealings therewith, except that they stated possession of the premises to have been taken by Ricketts, deceased, in 1810. No further proceedings were had in that suit, and Edmund Griffith died in June 1835 intestate, leaving E. Griffith the younger his heir-at-law. The latter died in 1842, having by his will, dated the 2nd of February 1838, and duly proved, devised and bequeathed all his real and personal estate absolutely to his widow and sole executrix, the plaintiff in the suit of *Griffith v. Ricketts*. In the years 1837, 1838 and 1841 Anne Frost sold parts of the mortgaged premises (which had been transferred to Solomon Moore by Edmund Griffith) to the Great Western Railway Company, Acraman & Co. (since become bankrupt), the Great Western Cotton Company, and several other purchasers. Some of the latter had since sold or contracted to sell their portions to the Great Western Railway Company. Anne Frost died in 1842, having by her will, duly proved, appointed her daughter Caroline Rosina Frost sole executrix, and devised and bequeathed to her upon certain trusts such of the mortgaged premises as remained in the possession of the testatrix and the purchase-money of such parts as had been sold by her. In July 1843 the plaintiff instituted the present suit (*Griffith v. Ricketts*) for redemption and reconveyance of the mortgaged premises against the real and personal representatives of the mortgagee and transferee (Ricketts the elder and Solomon Moore) and the purchasers and others claiming under Anne Frost. The plaintiff prayed to have the benefit of the proceedings in the suit of *Griffith v. Lunell*.

The Solicitor General and *Mr. Pirie* appeared for the plaintiff.

Mr. Walker and *Mr. Piggott*, for the mortgagees.

Mr. Bacon and *Mr. Selwyn*, for the assignees of *Acraman & Co.*

Mr. Bird, for several of the purchasers.

Mr. Bethell, *Mr. Kenyon Parker* and *Mr. Osborne*, for the Great Western Railway Company.

Mr. Wood and *Mr. Benedict L. Chapman*, for the Great Western Cotton Company.

Several grounds of defence to the bill were taken and argued, but the principal one, and that upon which the judgment of the Vice Chancellor proceeded, was, that the plaintiff, as devisee of the heir-at-law of the mortgagor, was not the proper party to claim the redemption and reconveyance of the mortgaged premises, inasmuch as the mortgagor had by the deed of release of 1810 converted the real estate into personalty, and had died without having attempted to revoke that deed or reconvert the property comprised in it.

Dec. 20.—WIGRAM, V.C.—The plaintiff in this cause claims under the will of Edmund Griffith the younger, who was the heir-at-law of Edmund Griffith the elder, to be entitled to the equity of redemption of freehold lands of inheritance, comprised in a mortgage alleged to have been made of the same lands by Edmund Griffith to Richard Ricketts, in the month of December 1800. The defendants in the cause, between whom and the plaintiff the contest in the cause has arisen, claim under Ricketts, the mortgagee. Amongst other defences they have insisted that the plaintiff is not entitled to the equity of redemption of the mortgage in question. They insist that the equity of redemption was so dealt with by Edmund Griffith, that at his death his personal representative, and not his heir-at-law, was the party entitled to the equity of redemption. The personal representative of Edmund Griffith is not a party in the cause; and it was admitted by the plaintiff's counsel, at the hearing of the cause, that if I should be of opinion that the defence above mentioned was well founded, the defect in the constitution of the suit could not be remedied by amending the bill and making the personal representative of Edmund Griffith a co-plaintiff in the cause; but it was suggested that if the personal representative were made a defen-

dant and disclaimed, that would enable the Court to make a decree in the plaintiff's favour, whatever the original rights might have been. To that argument I cannot accede. The question is, whether the plaintiff, at the time of filing the bill, was entitled to or interested in the equity of redemption, which she claims. If that question be answered in the negative, the disclaimer of the party entitled to it will not enable the plaintiff to sustain her suit. I had occasion to answer this point very early in my judicial life, and I found the authorities very clear upon it. An objection for want of parties was founded upon the same theory as to the state of the property at the death of Edmund Griffith. It was said that at all events the case was not so clear that I could properly decide it against the personal representative of Edmund Griffith, in his absence from the record; and a like objection for want of parties was said to arise in respect of the trustees and creditors of Edmund Griffith, interested under a deed of trust, upon the construction and effect of which the defence above mentioned depends.

I proceed, in the first instance, to consider this ground of defence.

The mortgage, as already observed, was made in the month of December 1800. In 1805 or 1810 (but I think I may say in 1805) the mortgagee entered into possession, and the possession has ever since been and now is in the mortgagee or persons claiming under him. The mortgagor has been out of possession ever since possession was taken by the mortgagee. In 1810 Edmund Griffith executed a deed, by which the equity of redemption and other property, real and personal, were transferred to trustees, upon trust to pay the debts of Edmund Griffith. The deed was of two parts, and made between Edmund Griffith of the first part, and the trustees Harford and Winpenny of the second part. The deed recited that a sum of 563*l.* had been advanced by Isaac Cooke to Edmund Griffith, and that Edmund Griffith was indebted to several other persons, and that the object of the deed was to convey his real and personal estate to Harford and Winpenny, subject to the incumbrances, in trust for the benefit of all his creditors. In pursuance of that

agreement, and in order to raise a fund to pay debts, and for a nominal consideration, Edmund Griffith bargained and sold to Harford and Winpenny all his real estate, subject to the present incumbrances, as well as all his personal estate, in trust to sell such property as was of a saleable nature; first of all, to sell a lease in Winterbourne and Frampton Cotterell in Gloucester, with the stock on the farm, for the purpose of paying the debt of 563*l.*; and if the produce was not sufficient for that purpose, to sell other property for the purpose of paying it. The further trusts of the deed were, that the trustees should retain the expenses of the management of the property, that they should afterwards pay the other debts of Edmund Griffith, and that if there was any surplus, then they should pay it to Edmund Griffith, his executors, administrators and assigns, to and for his and their own absolute use and benefit. Then followed the covenant that Edmund Griffith would ratify all the acts of the trustees, that he would not revoke any power given to them, that he would not interfere in any way to prevent the trusts being carried into effect nor hinder the execution of the trusts, but would aid its being carried into effect, and also a covenant for further assurance, and that he would join in any necessary sale. Upon the effect to be given to this deed and certain acts of the parties, the validity of the defence I am now considering depends. One question much argued at the bar was, whether the deed was revocable by the mere act of Edmund Griffith. That it was not absolutely revocable by the mere act of Edmund Griffith is too clear for argument. Clearly it was not revocable as against Mr. Cooke, nor against Mr. Harford if it be true, as the evidence states, that he was a creditor of Edmund Griffith for 1,300*l.*, nor could the deed be revocable against the creditors of Edmund Griffith, if any, between whom and the trustees such communications had taken place as would give them an interest under the deed. The question of revocation must at least be confined to the surplus proceeds of the estate comprised in the deeds which would remain after satisfying the claims of Cooke, Harford, and such other creditors, if any, as had acquired an

interest under the deed. If it were necessary, as I think it is not, to decide whether the deed was revocable at the mere option of Edmund Griffith as to the surplus proceeds just mentioned, I am not, as at present advised, prepared to decide in the affirmative. A voluntary conveyance of property upon trust to pay creditors not parties to the transaction has been very reasonably held to create a trust for the author of the deed, and not for his creditors. The transaction is assimilated to the case of a debtor putting money into the hands of his own agent to pay his debts, in which simple case it is clear that the debtor may countermand the authority unless the agent has acted upon it so as to give the creditors an interest in the money in his hands, as in *Bill v. Cureton* (1) and *Wilding v. Richards* (2). On the other hand, it is equally clear that a voluntary conveyance of property to trustees upon trust for a third party may create an indefeasible trust in favour of that party—*Ellison v. Ellison* (3), *Ex parte Pye* and *Ex parte Dubost* (4), and *Pulvertoft v. Pulvertoft* (5). The difference in principle between the two classes of cases is marked and obvious; but to decide to which of the two classes a given trust deed belongs is often a task of difficulty. It depends upon the intention of the author of the deed, to be collected from the deed itself and such surrounding circumstances as may be admissible in aid of the interpretation of the deed. The present case is not one of simple conveyance to trustees upon trust to pay the debts of Edmund Griffith; the deed contains a covenant on the part of Edmund Griffith not to revoke the deed, and also a covenant on his part to do all acts necessary on his part to effectuate the purpose for which the deed was made.

It was said in argument for the plaintiff that as the deed without the covenants by Edmund Griffith would make the trustees of the deed trustees or agents for Edmund

(1) 2 Myl. & K. 503; s. c. 4 Law J. Rep. (N.S.) Chanc. 98.

(2) 1 Coll. 655; s. c. 14 Law J. Rep. (N.S.) Chanc. 211.

(3) 6 Ves. 656.

(4) 18 Ves. 140.

(5) Ibid. 84.

Griffith, the covenants in question were in substance covenants by Edmund Griffith with himself, and therefore binding on him only so far as he might think fit. It cannot, I think, have been expected by the counsel who urged this argument that it would prevail with me. The covenants in question are part of the deed, and the character of the deed must be determined from a view of all its provisions including those covenants: whereas the argument fixes the character of the deed without reference to the covenants, which are as important as any other parts of the deed in fixing its character. To shew this, it is only necessary to put, hypothetically, the case which actually existed. Edmund Griffith was in prison for debt, and in order to release him it was necessary to raise money. Money was accordingly raised for the purpose; and it was to provide for the repayment of the money so raised, as well as to pay the other debts of Edmund Griffith, that the deed of 1810 was made. It is not too much to assume in such a case, that Mr. Cooke and the trustees should require a deed, irrevocable by Edmund Griffith, for the purpose of securing the payment of Edmund Griffith's debt. But as I have already observed, I think it immaterial for the purposes of this suit, whether the deed was revocable by Edmund Griffith or not. It appears to me sufficient for the purpose of the plaintiff in this suit, that the ultimate surplus of the property comprised in the deed was reserved to Edmund Griffith. The value of this ultimate surplus might be materially affected by the revocable or irrevocable character of the deed, but the only question with which the plaintiff in this cause has to do, is not the value of the equity of redemption which she claims, but who are the persons entitled to that equity of redemption if Edmund Griffith did nothing to revoke the deed. The case will be the same whether it was revocable or not. If he attempted to revoke the deed, the same being irrevocable, I should apply that attempt to the ultimate surplus, after paying all his debts, precisely in the same manner as I should apply it to the surplus remaining after paying Cooke's debt, and any other debt which the trustees had become bound to pay: in other

words, for the mere purpose of determining the question of conversion and reversion. The same reasoning will apply so much of the property comprised in the deed, whether that were the ultimate surplus after paying all his debts, or a larger part of the property.

Two questions then present themselves for consideration. First, what is the effect of the deed as between the real and personal representatives of Edmund Griffith? Secondly, is the effect of the deed altered by anything which has since taken place?

In considering the former of these questions, I shall assume that the latter is to be answered in the negative. I shall also suppose Edmund Griffith to have died not later than the year 1810, that being, as I understand, a deed made down to which the trustees under the deed of 1810 certainly continued to act in the execution of the trusts. The question to be answered, it must be remembered, is, not whether the proceeds of the trust estates are real or personal estate, but to which of the personal representatives those proceeds, whether real or personal estate, belong. The question arose under the will of Edmund Griffith and not under his deed, I think perhaps have little difficulty in answering the question. I should follow my decision in *Fitch v. Weber* (6), which is founded upon the authority of a case before Lord Thurlow, *Robinson v. Bland* (7). A will speaks from the death of the testator, and whatever is deemed real estate at the time of his death *primæ facie* belongs to his heir. A contemporaneous declaration that his real estate should be turned into personalty may alter the character of the property which the law takes, but unless it be given by the testator, there is no reason why the heir should not take it, although the trustee under the will may oblige him to take it as personal estate, and not as real estate. The question in this cause had arisen under the will of Edmund Griffith, the question would be, whether the limitation of the surplus to the executors of Edmund Griffith, who could not take benefit

(6) 6 Hare, 145; s.c. 17 Law J. Rep. Chanc. 73, 361.

(7) 2 Bro. C.C. 589.

was a gift of the surplus to his next-of-kin or his heir-at-law; and the decision between the two classes of representatives would be governed by the answer to that question. But a deed differs from a will in this material respect, that the will speaks from the death—the deed, from delivery. If then the author of the deed impresses upon his real estate the character of personality, that, as between his real and personal representatives, makes it personal and not real estate from the delivery of the deed, and consequently at the time of his death. The deed thus altering the actual character of the property is, so to speak, equivalent to a gift of the expectancy of the heir-at-law to the personal estate of the author of the deed. The principle is the same in the case of a deed as in the case of a will, but the application is different, by reason that the deed converts the property in the lifetime of the author of the deed, whereas, in the case of a will, the conversion does not take place until the death of the testator; and there is no principle on which the Court as between the real and personal representatives (between whom there is confessedly no equity) should not be governed by the simple effect of the deed in deciding to which of the two claimants the surplus belongs. It was with this view of the case that I observed, during the argument, that the *status* in which the property was found could not, as it appeared to me, affect the question as to whom it belongs to. In this view of the question, I find myself confirmed by the language of Sir W. Grant in *Thornton v. Hawley* (8). In that case the question was, whether money, the subject of a marriage settlement, was absolutely required to be laid out in land, or conditionally only. Sir W. Grant decided that the requisition was absolute, and said “there is no weight in the circumstance that the property is found in the shape of money or land, for the character is to be found in the deed; and in *Wheldale v. Partridge* (9), the Lord Chancellor lays down (in which I perfectly concur) that it is a circumstance that goes no way, except when the fund gets into the pos-

session of a party who would have it in either way”; and then, after observing that the money in that case never came into the hands of any one who could determine whether it should be money or land, he added, “we must go back to the deed, upon which the true construction is that it must be considered land.” There can be no doubt as to the mere construction of the deed in the present case. The deed gives the surplus to Edmund Griffith, his executors, administrators and assigns. I need not inquire how the case would be if Edmund Griffith had received the money, and dealt with it as his own estate.

The next question is, how the case would be if the trustees had sold the land in the lifetime of Edmund Griffith and had the money in their hands? In that case it would, I apprehend, clearly belong to the personal representative of Edmund Griffith. The words of the deed require this, and the case of *Van v. Barnett* (10), as explained by the plaintiff’s counsel, and to which I shall subsequently refer, supports the conclusion. Some of the observations of Lord Thurlow in the case of *Robinson v. Taylor*, above referred to, throw light upon the subject. The question, however, remains as to the surplus property sold after the death of Edmund Griffith or not required to be sold to pay his debts. The answer to this question must be found in the deed. I can understand the argument which alters the nature of the property accordingly as it is actually sold or not sold; but I cannot understand the reasoning which, in the case of a deed, would give the surplus to a different person according only to the time when the trustees may happen to exercise their trust for sale. In the absence of authority, therefore, I should conclude that the personal representative of Edmund Griffith, and not his heir, is the party entitled to the surplus of the property comprised in the deed of 1810. With respect to authority, the late case of *Biggs v. Andrews* (11) is a direct authority in point. It is true, indeed, that the language of the deed in that case does in a popular sense express more clearly

(8) 10 Ves. 138.

(9) 5 Ves. 388; s. c. 8 Ves. 227.

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(10) 19 Ves. 102.

(11) 5 Sim. 424.

than the language in the present case the intention of the author of the deed that the surplus property should become personal estate; but the limitation of the surplus to Edmund Griffith, his executors, administrators and assigns, expresses in technical language all that is expressed in popular language in the case of *Biggs v. Andrews*, and I am not at liberty to suppose that Edmund Griffith, using technical language, did not understand its effect. The case of *Van v. Barnett* appears to me to be an authority in support of the same proposition. In that case, as in this, Van conveyed his property to trustees upon trust to sell and pay his debts, and to pay the ultimate surplus to Van, his executors, administrators and assigns. It appears, by searching the Registrar's book, that Van filed his bill complaining of the conduct of his trustees. He did not, however, seek to revoke the deed, but prayed, in effect, that the trusts of it might be executed by the Court. In that suit, as I understand it, real estate was sold in the lifetime of Van, and the proceeds came to be administered by the Court according to the trusts of the deed. Van died, and the question arose between his real and personal representatives as to the surplus proceeds not required to pay Van's debts. Lord Eldon decided in favour of the personal representatives, but gave no opinion as to the real property, if any, remaining unsold. Whether there was any such does not, I think, appear. That case decides that the trusts of the deed deprived the heir-at-law of his expectancy, so far at least as relates to real estate converted before the death of Van. But if it be once admitted that that is the effect of the deed as to part of the property, I cannot follow the reasoning which would ascribe any other effect to the deed in its application to other parts of the property. The sale or non-sale of the trust property may affect the character in which any surplus may go to the party to whom the deed gives it, but not the party to whom it is given. Such an intention cannot be ascribed to Edmund Griffith without express words or the clearest implication, of which I find none in the present case. I think, therefore, both upon principle and authority, the personal representative of Edmund Griffith, and not

his heir-at-law, is the party entitled to the surplus of the property comprised in the deed of 1810. Many dicta may be found in apparent conflict with what I have decided, but may, I believe, be reconciled with the present decision by adverting to this circumstance, that those dicta are applied to wills, and not to deeds, or they are applied only to deeds in which there has been no disposition of the ultimate surplus, or none inconsistent with the claims of the heir. I have referred to the *Treatise on Conversion* by Leigh and Dalzell (12), but I do not find anything in it which conflicts with the above conclusion. The distinction is that which I have noticed above.

The remaining question is, then, is the effect of the deed altered by anything which has since taken place? This must be answered by inquiring whether Edmund Griffith did anything in his lifetime indicating an intention to alter the state of the property as it was fixed by the deed of 1810. Two points were relied on in argument by the plaintiff's counsel. First, the length of time that had elapsed since anything was done by the trustees; and, secondly, Edmund Griffith's suit in 1827. With respect to the former point, it is not the lapse of time, but the acts of parties during that time that must be looked at. The evidence shews that the debts of Edmund Griffith, provided for by the deed, have not been satisfied. If, indeed, I am to give full effect to what the witnesses say, Cooke's debt which is specified in the deed, and a debt of 1,300*l.* owing to Harford, one of the trustees, or of any other creditor, between whom and the trustees communications may have been made, are still unpaid, and the trustees only ceased to act in paying the debts when they were unable to realize assets for the purpose. In the mean time the property, which is the subject of this suit, has been, since 1805, in the possession of mortgagees, and Edmund Griffith has neither enjoyed it nor asserted a title to it adverse to the trustees, unless the suit of 1827 be an act of that description. I may observe, however, that in strictness it is not necessary that I should

(12) *Treatise on the Equitable Doctrine of Conversion*.

insist upon the evidence above mentioned, for the onus is on the plaintiff to prove the reconversion, and it is sufficient that she has not done it.

With respect to the suit of 1827 the trustees were not parties to it. The suit does not seek to displace them, and the attempt of Edmund Griffith to redeem the property in that suit is not only consistent with the deed of 1810, but, in strictness, must be intended as the act of Edmund Griffith, in furtherance of his covenants in the deed of 1810. The circumstance that that suit was not prosecuted with effect may well be taken to explain why the trustees have been hitherto unable completely to carry out the trust of the deed. So long as Cooke's debt, or any part of it, or the debt of Harford, or any other creditors, between whom and the trustees communications may have been made, remain unpaid, I cannot assume that the trust deed has been abandoned by the parties interested in it.

The conclusion I have come to on that point supersedes the necessity of my saying anything on the other parts of the case; but as this cause will of course be the subject of review in a superior court on account of its great importance to the parties, I will state simply to what extent I have gone in considering the other parts of the case.

Supposing the bill to be filed (which is the simplest way of putting it) against Anne Frost, and she had not parted with any part of the property, the only point on which in that view of the case my mind is not made up (and I could not make up my mind without reading the pleadings through from the beginning to the end with the greatest possible care) is the question, whether the plaintiff is precluded from getting relief in this suit by reason of the pleadings as to the mortgage-deed, the original bill stating it to be a deed of two parties, and the supplemental bill adopting that, and it appearing *ex concessis* there never was any such deed. I give no opinion upon it, as I could not satisfactorily do so without reading through the papers. Upon the other parts of the case, supposing Anne Frost was a defendant, I do not think I should have any difficulty in giving the relief sought. Upon the other point about the purchasers under Anne

Frost, I am precisely in the same situation. It is only by an elaborate consideration of all the pleadings that I could come to a decision on these two points. These are the only two points on which my mind was in suspense, except the point as to which I have given my opinion.

Bill dismissed, with costs.

L.C. }
Jan. 14, 18, 22. } CRADOCK v. PIPER.

Practice—Authority of the Master under the ordinary reference to tax Costs—Costs of Trustee acting in the Cause as Solicitor for himself, his co-trustee, and cestuis que trust.

Under the ordinary reference to the Master to tax the costs of trustees, it is competent to the Master to take notice of the fact, that a trustee has appeared for himself as solicitor in the proceedings, and to disallow him all costs, except costs out of pocket.

A trustee, a solicitor, appearing for himself as party to a suit is only entitled to costs out of pocket; but this rule does not extend to the case of a trustee acting as solicitor in the cause for his cestuis que trust or his co-trustees; and where such trustee had appeared jointly for himself and his co-trustees, and no extra costs had been occasioned thereby, he was allowed the full costs of such appearance.

Where the order of the Court below was held upon appeal to be right in effect, though founded upon erroneous principles, the appeal was dismissed, with costs.

The question raised by the two petitions in the cause, which now came on for rehearing, before the Lord Chancellor, was as to the costs of a trustee, a party to the cause, who had acted therein as solicitor for himself, his co-trustees and his *cestuis que trust*.

Robert Piper, the testator in the cause, by his will dated in 1829, appointed T. Mitchelson, T. M. Kendall, J. Watson and W. Grandon executors and trustees of his will; and devised and bequeathed to them certain leasehold tithes and other property, upon trusts for sale; and to apply the proceeds upon the trusts of his will. The

four executors and trustees having proved the will instituted the suit of *Mitchelson v. Piper*, for the general administration of the trusts of the will, against the defendants, who were the persons beneficially entitled under the will. In that suit a decree was made for sale of all the real estates devised in trust. Watson, who had been the solicitor of the testator at the time of his death, acted as the solicitor of the plaintiffs in that suit. The personal estate being found insufficient for the payment of debts, the suit of *Parkinson v. Piper* was instituted by two simple contract creditors of the testator for the purpose of having the assets marshalled, and the defendants to that suit were the four trustees and the persons beneficially interested under the will. In this second suit, Watson acted as solicitor for the plaintiffs, for himself and his co-trustees, and for the greater number of the *cestuis que trust*. The cause of *Cradock v. Piper* sought relief merely in respect of certain estates specifically devised by the will. By the decree in the suit of *Parkinson v. Piper* the accounts were directed of the real and personal estate, and the Master was to be at liberty to adopt the accounts taken in the former suits. By an order, on further directions, made in the suit of *Parkinson v. Piper*, in April 1839, it was referred to the Master to tax all parties thereto, and to two subsequent suits of revivor and supplement, their costs of the said suits, the costs of the defendants to be taxed as between solicitor and client; the consideration of further directions and of the payment of the costs, ordered thereby to be taxed, being reserved until the Master should have made his report. The Master, under that order, proceeded to tax the costs of the defendants as between solicitor and client, without regard to the fact that Watson was a trustee, no objection having been raised on that ground. By an order made in all the causes, on subsequent further directions, on the 4th of June 1847, it was ordered that the Master should tax the subsequent costs of all parties, the costs of the defendants as between solicitor and client, and that the Master should add the respective amounts of such costs to the respective amounts of costs taxed under the order of the 30th of April 1839; and that the same should be paid as therein men-

tioned. The Master, in taxing the under this order, allowed all the co-Watson, occasioned by his appearing for defendants, his *cestuis que trust*; but allowed him costs out of pocket in respect of his appearance for himself and his trustees.

Watson then petitioned that the Master might be ordered to review his taxation to the items disallowed by him in respect of the appearance of Watson for himself and his co-trustees. Eight of the *cestuis que trust*, defendants in the suit, also petitioned for a review of the taxation as to the costs allowed by the Master in respect of Watson's appearance for them.

Both petitions came on to be considered before the Vice Chancellor of England in June 1849, when his Honour made an order upon Watson's petition, for the Master to review his taxation as to the costs incurred by Watson, in appearing for himself and his co-trustees, and to the same; and he dismissed the petition of the *cestuis que trust* with costs; proceeding upon the ground that the previous order directed taxation between solicitor and client: and that having been acted upon in the former mode, by giving full costs to Watson, a subsequent order for taxation must proceed upon the same principle; the parties having so long acquiesced in that construction of the order.

The *cestuis que trust* appealed from the orders made on both petitions.

Mr. James Parker and *Mr. Wrigley* were the appellants.—The Master, in taxing the costs, disallowed all costs of Mr. Watson except costs out of pocket, in respect of his joint appearance for himself and his trustees, and rightly.

[The LORD CHANCELLOR.—Is it within the province of the Taxing Master to exercise this discretion without special directions?]

This has always been the practice in *Bainbrigge v. Blair* (1), *Prebble v. Hurst* (2); and in *York v. Brown* (3) the Court held it was competent to the Master under the usual order, to take notice of the fact of the solicitor being a trustee, and refused to give any special directions.

(1) 8 Beav. 588.

(2) 2 Sim. 246.

(3) 1 Coll. 260.

practice must necessarily be so; because, in most cases, until the bills are carried in before the Master, neither the Court nor the parties can know whether they will contain objectionable items of this character. If the Court is not satisfied as to the practice in this respect, it will put the matter in a course of inquiry. It is clear that a trustee acting professionally as solicitor is not entitled to anything but costs out of pocket—*New v. Jones* (4), *Robinson v. Pett* (5), *Moore v. Frowd* (6), *Bainbrigge v. Blair*, *Fraser v. Palmer* (7); in which last case the same rule was extended to the costs of a trustee appearing for his *cestuis que trust*. But the Vice Chancellor's order proceeded also on the ground of acquiescence in the mode of taxation under the order of 1839. At the time of that taxation, Watson appeared as the solicitor of all parties; so that there was no one to check the accounts. The acquiescence, therefore, of the petitioners was in ignorance of their rights, and will not bind them—*Todd v. Wilson* (8).

Mr. Bethell and *Mr. Sidebottom*, for the respondent.—First, the way in which the Master has proceeded in the taxation is not justified by the terms of the order; for the term "costs" means professional remuneration, and not money expended. The Master cannot go out of the decree and make himself a judge of the merits. The case of *New v. Jones* professes to be derived from *Robinson v. Pett*; but the latter case only decides that a trustee is not to be allowed to derive any personal profit from the trust. There is no trace of any such rule existing in the time of Lord Eldon; but *Carmichael v. Wilson* (9) rather implies the contrary. The rule, if it exists, can only apply to the costs of the trustee himself; but here it is sought to be extended to his appearance for his co-trustees, and also his *cestuis que trust*. The costs directed to be paid are the costs of the party, and not of the solicitor; and if these latter costs are disallowed, then the effect of that will be that Watson will have a personal claim against the parties for these costs; for it was no part of his

duty as trustee to appear for them. And, further, no additional expense was incurred by Watson appearing jointly with his co-trustees. Lastly, the appellants are bound by their acquiescence in the mode of taxation adopted in 1839.

Mr. J. Parker replied.

Jan. 18.—The LORD CHANCELLOR.—The first question is, whether under a general order to tax costs (whether as between solicitor and client or between party and party makes no difference as to the present point), it is competent to the Taxing Master to discriminate between the costs of a trustee acting as solicitor and the ordinary costs payable in the event of that circumstance not occurring. In this case the Master has disallowed all costs except costs out of pocket, on the ground that the solicitor was a trustee. It appears that he was a party as trustee in several suits, in some of which he acted as solicitor for other parties who were his *cestuis que trust*; in one suit as solicitor for the plaintiffs, his co-trustees; in others as solicitor for the defendants, the *cestuis que trust* and his co-trustees; in others as solicitor for himself, made party as a trustee; and the Taxing Master has disallowed the costs in all cases where he has acted for himself and his co-trustees. Now, the first question is, whether under the ordinary reference to tax costs it was competent to the Taxing Master to exercise that jurisdiction. It struck me at first that it was a large discretion for the Taxing Master to exercise, for it was in substance not taxing the costs at all, because disallowing all but costs out of pocket is in substance disallowing all costs; because what are called costs out of pocket are not costs at all in the professional sense of the term; and this appeared to me a wide discretion for the Master to exercise under the terms of the ordinary order for taxation. But I find that the order has been so understood by the present Taxing Masters. The question arose in a case before the Vice Chancellor Knight Bruce in the case of *York v. Brown* where it was held that under the common order, it was competent to the Master to deal with the costs of a trustee in this way. I was desirous of ascertaining what the practice was, prior to that decision, before the Masters in ordinary, upon whom this

(4) 9 Byth. Convey. by Jarm. 731.

(5) 3 P. Wms. 249.

(6) 3 Myl. & Cr. 45; s. c. 7 Law J. Rep. (N.S.) Chanc. 113.

(7) 4 You. & C. 516.

(8) 9 Beav. 486; s. c. 15 Law J. Rep. (N.S.) Chanc. 450.

(9) 2 Moll. 537.

duty devolved prior to the appointment of the present Taxing Masters. I therefore ascertained that by referring to some of the Masters in ordinary who were the Taxing Masters prior to this decision of the Vice Chancellor Knight Bruce; and I have had this certificate from the senior Master, whose experience and attention to the business of the Court entitles his opinion to the highest consideration. I speak of Master Dowdeswell. "Under the common order for taxation of costs as between solicitor and client, it was my practice, and I believe it was the practice of the other Masters, to disallow all costs to a solicitor who was also a trustee, except costs out of pocket, in all cases where the objection was taken; and that without any special order as to the allowance of any such costs." I have also the same opinion from Master Farrer and Master Rose. Those being at present the only three Masters, as far as I am aware, who have had any experience in taxing costs before that duty was transferred to the present Taxing Masters. That, coupled with the acknowledged practice of the present Taxing Masters, leaves no doubt on my mind that my first impression was not correct, though I have great difficulty in reconciling this practice with the words of the order; yet, as the practice of exercising such a discretion is established, that part of the case which is founded on a supposed excess of power in the Master falls to the ground.

Then the next question is, whether the Master has rightly exercised that discretion. Now, as to the costs of a trustee himself, where he is a party to the cause, as trustee, no doubt the Master has rightly exercised his discretion in disallowing him his costs. The Vice Chancellor of England, however, seemed to be of opinion that the rule did not apply to the present case, on the ground that these suits having been many years pending, the costs had by a former order been directed to be taxed, and no attention having been directed to the fact that the solicitor was a trustee acting for himself as trustee, this distinction was not taken; and the costs were taxed as between solicitor and client, without reference to this objection. Then the order upon which the present costs were ordered to be taxed, takes that up as a sum fixed, and directs the costs, to be taxed, to be

added to such former costs, and the amount to be paid. But there is nothing in the last order directing the Master to allow costs not otherwise allowable; and I cannot see why an error in the prior taxation of costs, there being no order to tax costs in the same manner, should lead to the conclusion that the Court intended that error to be acted upon in the present case. I think, therefore, that under the present order all the Master had to do was to see what that order was, and thereupon to perform the ordinary duties of a Taxing Master, as if the reference had been made to him in the first instance to tax costs as between solicitor and client, without any specialty in the order. Then he has disallowed all the costs of the solicitor acting for himself, in which I have no doubt he was right.

But then it is contended that a trustee, having acted as solicitor for other parties, his *cestuis que trusts* and co-trustees, is only entitled to costs out of pocket, in respect of such employment. It might, indeed, be a security against abuse, if the rule were held to apply to such cases. A trustee, who is a solicitor, is very likely to be intrusted with the exclusive management of suits regarding the trust property and with a large discretionary power as to the institution and conduct of such suits, and would be too liable to be influenced by the profits accruing, as well from the costs of other parties as his own, unless this rule were applied. But practically, the security is not very effectual, since the rule is so easily evaded. But the question is, whether the rule has been so extended, rather than the consideration of the advantages that might be supposed to be derived from it, if it were so extended. Now the rule is founded on this principle, that a trustee shall not be permitted to make a profit of his office, which he would do if, being a party to a cause and a solicitor he were permitted to derive professional profits from acting for himself. In the case of *New v. Jones*, the question arose on business done by a trustee as a solicitor, and it was held that he could not charge for such business. In *Moore v. Frowd* the business, in respect of which the costs were claimed, was the proper business of a trustee; and that that was the ground of my decision is clear from what I then said—"If an attorney be

allowed to make profit, by means of professional business, of his office of trustee, it will constitute an exception to a rule well known and established in all other cases; a factor, acting as executor, is not so entitled, nor a commission agent." The case of *Carmichael v. Wilson* has been supposed to be an authority, founded upon an opinion of Lord Eldon, against the existence of this rule; but it is clear from a report of the same case in another stage, 2 *Dow & Cl.* 51, that the report in *Molloy* cannot be relied on. The decision is stated in *Molloy* to have been made in December 1825, upon exceptions to the Master's report; but from the report in *Dow & Clark* it appears that such a question could not then have been decided. An executor, being a solicitor, had instituted several suits in respect of his testator's estate; and upon an application by a legatee against him, the Master was directed to inquire as to the propriety of the institution and conduct of such suits, without prejudice to the question whether the executor was entitled to his professional costs; shewing that the rule, which is supposed to have been first established by the case of *New v. Jones* was in existence, and was recognized by the Court of Chancery in Ireland at that time. On that reference the Master made his report, stating his objections to the conduct of the causes, and suggesting that, as such suits were still pending, it would be proper to postpone the consideration of the executor's costs till the results of those suits were known. To this report the executor excepted; and the exceptions were heard on the 6th of December 1825, which is reported in 2 *Molloy*; but the only question before the Court there was, whether the consideration of the costs should be postponed, and not at all with respect to the mode in which they should be taxed. So far, therefore, as the rule had been laid down and acted upon, it has been confined to cases in which the business of the solicitor was the proper business and employment of the trustee. But it is no part of the business of a trustee to assist other parties in suits relating to the trust property. If, therefore, a trustee acts as solicitor in the business of any other party, that is not the proper business of the

trustee himself; and, consequently, the rule as to costs will not apply; and hitherto no case has arisen extending the rule to the costs of a trustee employed as solicitor for other parties, except, it may be, in the case of *Fraser v. Palmer*. The distinction was there taken. In that case there were three suits. In the first suit, *Fraser v. Palmer*, Fraser, the plaintiff, claimed as creditor upon the fund, and Palmer and his wife were the *cestuis que trust*; and Harmer, the trustee of the fund, acted as solicitor for the defendants; therefore, it was the case of a trustee of the fund acting as solicitor for his *cestuis que trust*, and Baron Alderson was of opinion that he was, notwithstanding, entitled to the costs of the suit. That is one of the very points which have been raised here. Harmer was not performing any duty as trustee; but happening to be trustee he was employed as solicitor by the *cestuis que trust*, and he was allowed his costs in that suit. In the second suit, *Palmer v. Fraser*, which was a bill filed by the husband, the trustee himself was a party defendant; and in the third cause, which was an action at law, the trustee was the plaintiff. The Master had disallowed the costs of the trustee in all the suits; and Baron Alderson says, "I think the Master was wrong as to the first suit, and right as to the others. In the first suit, Harmer was not acting in the character of trustee, though he was Mrs. Palmer's solicitor. As to the other matters, he is clearly not to be allowed more than his costs out of pocket. The principle is, that the estate is to be protected by the unbiassed judgment of the trustee."

The only part of the case which is defective for the present purpose is that as to the suit in which the wife and Harmer were defendants, and in which Harmer appears to have acted for both. The distinction was not taken by the judgment in this case. It would appear as if he had been disallowed all the costs in that suit. It is not very clearly stated, nor does it appear for what reason he was not allowed the costs of appearing for Mrs. Palmer, when he had been allowed such costs in the first suit. But for the present purpose this is clear from the case, that where a trustee of the fund is employed by his *cestui que trust* in the suit, the circumstance of his being such

trustee will not deprive him of his costs in that suit; and that where he acts for himself, being a party, he shall not be allowed his costs. That falls in with all the former cases, but there is no case that I can find in which the principle has been extended beyond the dealing of a trustee acting for himself in the execution of the trust.

In this state of the authorities, and in the absence of all authority to the contrary, I am of opinion that the Master has very properly disallowed Mr. Watson all costs incurred in acting for himself; but that he must be allowed all costs incurred in acting for other parties. If the case requires that I should specify how the principle is to be applied to the particular charges, I must have the pleadings for that purpose.

The case then stood over for Mr. J. Parker and Mr. Wright to point out any items of costs which were occasioned by the appearance of Watson alone.

Jan. 22.—The case now coming on to be spoken to,

Mr. J. Parker contended, that the Master, in applying the principle, would, in the cases where Watson had appeared for himself jointly with the other defendants, the *cestuis que trust*, so as only to make one set of costs, disallow Watson his proportion of the costs of such appearance; and that where he appeared for himself and his co-trustees jointly, all such costs should be disallowed—*Bainbrigge v. Blair*.

[The LORD CHANCELLOR.—The case cited did not decide that point; and even if that were the rule, it would have a mischievous tendency, for the only effect of it would be, that the trustee, the solicitor, would appear for his co-trustee, and use another person's name as appearing for himself. It would, in fact, increase the costs.]

Mr. Bethell, contra.—The case put of the disallowance of the costs of one of four defendants appearing jointly does not apply; as the solicitor there recovers from his own client the proportion so struck off. The reason of the rule is simply, that the trustee shall not be allowed remunerating costs; and no additional expense has been incurred by the appearance of Watson jointly with his co-trustees.

The LORD CHANCELLOR.—The application of the rule to a state of circumstances where the trustee had appeared jointly for himself and other parties was not before me on the previous hearing. In the case that was put as analogous to the present, namely, one of four parties appearing jointly being disallowed his costs, the intention of the Court, in making such order, could not be carried out, except by striking off his proportion. But here the intention of the Court being that the trustee shall be entitled to his costs as an ordinary solicitor, in respect of parties for whom he appears, excluding only costs incurred by himself as trustee independently of the other trustees, if such apportionment as is contended for were made, then the intention of the Court would be frustrated, for he would not get the full costs of the other parties for whom he appeared. I am of opinion that the circumstance of his appearing jointly with his co-trustees ought not to diminish those costs, which, upon the principle I have laid down, he is entitled to receive, as his appearing jointly with them did not increase the costs of his clients. I assume that no items can be pointed out of extra costs occasioned by the solicitor appearing for himself or jointly with his co-trustees. The order should be prefaced in some such way as this, "That it appearing that the costs of the other parties were not increased by this trustee being joined with them, &c., let the Master tax these costs as if the solicitor were not a trustee."

Mr. Bethell then asked that, as the order of his Lordship was substantially the same as that of the Vice Chancellor, the appeal might be dismissed, with costs.

Mr. J. Parker submitted that as, though the result of the order was the same, the Vice Chancellor's order was founded upon erroneous principles, there ought to be no costs of appeal.

The LORD CHANCELLOR.—It is the order that is appealed from, and not the reasons on which it is founded; and as the order turns out to be correct, the appeal must be dismissed, with costs.

M.R. }
 July 25, 26; }
 Nov. 14. } RODICK v. GANDELL.

Equitable Assignment — Debts — Solicitor's Undertaking — Partner's Responsibility — Bankers — Balance of Account — Costs.

G. & B, engineers, had overdrawn their account with their bankers, but large sums of money were owing to them from several railway companies for whom P. & W. acted as solicitors. W, at the request of the engineers, wrote to the bank for himself and partner, stating that they would, on receiving the monies due from the railway companies, pay them to the bank, to the credit of the engineers. The manager of the bank wrote to P. & W, acknowledging the receipt of this letter, as guaranteeing the payment of the monies received by them on account of Messrs. G. & B; it also, in a postscript, stated the amount of the balance then due, and that on payment thereof, this letter would be given up to P. & W. Messrs. G. & B. subsequently became bankrupts:—Held, that the transaction did not amount to an agreement for an equitable assignment of the monies due; and that the plaintiff was not entitled to the relief asked.

The bill was dismissed without costs as against W, and also against P, his partner, though he knew nothing of the facts, but with the costs of serving G. & B. with the subpoena to hear judgment only, and with costs as against their assignees.

John Haskins Gandell and John Brunton carried on the business of civil engineers at Birkenhead, in partnership, under the style or firm of Gandell & Brunton, and as such they were employed by the Cheltenham, Oxford, and London Junction Railway Company; the Thames Valley, Oxford, and South Wales Railway Company; and the Direct London and Holyhead and Port Dynllaen Railway Company; for all which companies Messrs. Pinniger & Westmacott were the solicitors.

In the year 1845, and for some time previous, Messrs. Gandell & Brunton were customers of the Liverpool Banking Company, and they were indebted upon their account in the sum of 2,762*l.* 11*s.* 7*d.* In

December in that year, James Lister, the manager of the Bank, requested Messrs. Gandell & Brunton either to pay their account or to give them some sufficient security. In this state of their affairs, Messrs. Gandell & Brunton applied, through Mr. Watson, as their agent, to Mr. Westmacott, to concur in some arrangement with the bankers; and on the 24th of December 1845, Mr. Westmacott, in a letter to Mr. Gandell, said, "If you were here, no doubt we could understand each other, and comply with all the bankers' desires. Could you not arrange it in this way? Give the bankers a statement of what is due to you from each company, then give a direction to us that these sums when paid shall be paid to your account with them, and we write them a letter, stating that on the payment they shall be so placed to your credit; you can state to them that that has been suggested by us as the proper course. I trust to your giving all proper explanations to the bankers."

On the 26th of December 1845, Messrs. Gandell & Brunton followed these suggestions, and wrote to Messrs. Pinniger & Westmacott as follows:—"Dear Sirs,—We hereby request of you that you will pay into the bank of Messrs. Cunliffes, Brookes & Co., for the Liverpool Union Bank, all monies now due to us from the Cheltenham, Oxford, and London Junction Railway; the Thames Valley, Oxford, and South Wales Union Railway; and the Direct London and Holyhead and Port Dynllaen Railway; and we hereby authorize you to receive such monies in our names, for the purpose, from the different committees. We will thank you to write to the bank, saying you will act on this letter."

On the 27th of December 1845, Mr. Westmacott wrote to Messrs. Cunliffes, Brookes & Co. as follows, inclosing a copy of the letter received:—"Gentlemen,—We have received from Messrs. Gandell & Brunton a letter, of which we hand you a copy on the other side. As requested by that letter, we beg to say that we will, on receiving the monies due to Messrs. Gandell & Brunton from the several railways mentioned, pay them to you, to their credit, and that we will effect this as early as possible. For Pinniger and self, H. S. Westmacott."

Mr. Westmacott inclosed this letter to Messrs. Gandell & Brunton, with a letter from himself, which was as follows:—
 “Cheltenham, December 27, 1845.—Sirs, your letter of the 26th reached me here this evening; I inclose a letter to the bankers, which I have no doubt will answer your purpose. I am, &c., H. S. Westmacott.”

On the 29th of December 1845, Messrs. Gandell & Brunton sent this letter by Mr. Watson to Mr. Lister; he said the letter would do; Mr. Watson then inquired whether Messrs. Gandell & Brunton would be allowed to draw against it; but Mr. Lister refused to consent, and said he should hold the letter for the money then overdrawn, and should not make any further advances. On the same day, Mr. Lister wrote the following letter to Messrs. Pinniger & Westmacott:—“Gentlemen,—I have received your favour of the 27th inst., guaranteeing the payment of all monies received by you on account of Messrs. Gandell & Brunton into our hands.” He also added, in a postscript:—“The amount due to us is under 3,000*l.*, on payment of which your letter will be given up.” Messrs. Gandell & Brunton also, on the same day, upon being informed of Mr. Lister's refusal to allow them to increase their balance, again sent Mr. Watson to the bank, with the following letter:—“Dear sir,—We were very much surprised to learn from Mr. Watson the result of his interview. With so large an amount due to us from highly respectable parties, who have acknowledged their liability, and are now subscribing to pay us our accounts, together with the undertaking of men of such high standing as Messrs. Pinniger & Westmacott, we could not have supposed you would have hesitated to make us the moderate advances we require. Fully relying that this would have been the case, we had, previous to the return of Mr. Watson, drawn some further small sums, making the total advance to us about 3,000*l.* We shall fully rely upon your protecting these cheques, but shall not, of course, in compliance with your request, make any further drafts upon you. Yours, &c., Gandell & Brunton.” To this was added a postscript, as follows:—“As the letter you now hold is for so large an amount, we have sent to London

for a similar letter, covering only the amount of the advance to us, 3,000*l.*”

In consequence of this letter Mr. Lister consented to honour the cheques which had been drawn, and to allow the balance to be extended to 3,000*l.* And it would seem that Mr. Lister subsequently added the postscript to the letter he had written to Messrs. Pinniger & Westmacott. On the 13th of February 1846, Mr. Lister wrote to Messrs. Pinniger & Westmacott—“Gentlemen, I will thank you to inform us if any payments have been received on account of Messrs. Gandell & Brunton's claim, and when the amount due to them will be paid.” On the same day Mr. Lister wrote to Messrs. Gandell & Brunton respecting their accounts, to which the following answer was returned on the 14th of February: “Messrs. Gandell & Brunton present their compliments to Mr. Lister, and beg to acknowledge the receipt of his favour of the 12th inst. They extremely regret that the account has not yet been reduced, but in fact increased. Messrs. Gandell & Brunton would not have drawn the cheques they have, but they had a positive pledge that a large sum of money from the Birkenhead and Holyhead line would have been paid in to their account during the past week. They will draw no more cheques until money is paid in to reduce the balance. Messrs. Gandell & Brunton are glad Mr. Lister has written to Mr. Westmacott: 15,000*l.* is due to them from the lines to which Mr. Westmacott is solicitor, and they are as anxious as Mr. Lister can be that their account should be paid off by payments from those companies. Other large sums are due, which they will exert themselves to get in during the week. Mr. Lister need not have any fear as to the safety of the money owing by them to the bank.” On the 18th of February 1846, Messrs. Gandell & Brunton wrote to Mr. Lister as follows:—“Dear Sir,—Tomorrow there will be paid into your bank to our credit 150*l.*, against this we have drawn two cheques for 30*l.*, and we shall be rapidly sending further sums, and drawing against them as little as possible, so as to effect a speedy reduction of the balance. We will also advise you of all cheques which we draw, until we have the pleasure of seeing you at Liverpool. We are effecting

such arrangements with the different companies, that we have no doubt the whole balance will be very shortly liquidated; at all events you may safely rely upon our redeeming it day by day." On the 20th of February 1846, they again wrote to Mr. Lister—"We beg to acknowledge the receipt of your letter of yesterday. We are extremely anxious with yourself that our balance should be reduced, and beg to make the following proposition. It is extremely inconvenient to men in business not to be able to make payments in the usual form, and we therefore propose to pay in money from time to time which, as we before stated, we shall now be doing rapidly, and drawing against such sums to the extent of 25 $\frac{1}{2}$ per cent. and not more; this will effect a strong and speedy reduction of our balance, and afford us the means of making our payments through the customary channel, and we therefore trust there will be no hesitation in acceding on the part of your directory." On the 24th of February 1846, Mr. Westmacott answered the letter previously written to him by Mr. Lister.—"Sir,—In reply to your letter of the 13th, we beg to say that no payments have yet been received on account of Messrs. Gandell & Brunton, but we expect very shortly that this will be the case, when we shall of course duly apprise you." During this correspondence various sums of money were received by the banking company on account of Messrs. Gandell & Brunton, but were again drawn out by them, so that the balance due from them was never diminished. Mr. Lister, therefore, on the 21st of May 1846 wrote Mr. Westmacott,—"I will thank you to inform us when you will be able to make a payment on account of Messrs. Gandell & Brunton, and what the amount will be." This letter was immediately communicated to Mr. Gandell, who on the 22nd of May 1846, wrote in answer, "I am in town for the purpose of the settlement of the Cheltenham and Port Dynllaen Railway accounts. Mr. Westmacott has shewn me your letter to him of yesterday's date. As I informed you some time ago, we are suing affluent members of both committees through Mr. Gooday, solicitor of, &c., Mr. Westmacott not being able to act for us, being the solicitor to the company. It has

been suggested by the managing committees of both lines, that our account should be referred. They have been so referred to an eminent engineer, whose award will be given in the course of the next day or two. Mr. Westmacott has then promised to call a meeting of the managing committees, with a view to a more immediate settlement of the matter, than by means of litigation. In either case a very considerable sum must shortly be paid to us, and our account at once considerably reduced." Mr. Lister, being dissatisfied, on the 13th of June 1846 again wrote to Messrs. Pinniger & Westmacott—"I wrote to you on the 21st ult. requesting information about Messrs. Gandell & Brunton's affairs. Before taking any steps I should feel obliged by your saying how much you are likely to pay us, and when, on their account?" In answer, Mr. Westmacott sent a letter of the 18th of June 1846 inclosing various printed circulars, and said—"In reply to your letter of the 13th we inclose you circulars, which are now going out on the Cheltenham and Port Dynllaen lines. How much Messrs. Gandell & Brunton are likely to pay you from those sources, and when, must of course depend upon the contributions coming in. We trust the applications made will be readily responded to." On the 19th of June 1846 Mr. Lister wrote to Messrs. Gandell & Brunton—"I beg to inform you that the directors are quite tired of being put off with your repeated promises, and to state that if the balance is not paid, or tangible security afforded them, the bank's solicitor will be requested to close the matter by legal proceedings." On the 26th of June 1846 Messrs. Gandell & Brunton wrote in reply, "It is utterly impossible our settling the claim of the Liverpool Union Bank until we recover the sums due to us from the different railway companies. Our different actions will be tried at the Assizes, if not settled before. Respecting security, this is a matter that we cannot arrange in a day. It is a large amount to ask our friends to be bound for, and they require time to investigate and consider. Under these circumstances we trust the directors will wait, and not add to our present debt, law expenses. As soon as we can ascertain what security we can offer, we will again

communicate with you," and in a postscript they added "We have before offered to assign one of our railway accounts as security to the bank." On the 27th of June 1846, Mr. Lister wrote to Messrs. Gandell & Brunton stating that the balance of their account could not be allowed to remain, and that if not immediately covered, the bank's attorney would be directed to commence proceedings. On the 9th of July Messrs. Lowndes, Robinson & Bateson, the solicitors of the bank, wrote to Messrs. Pinniger & Westmacott as follows: "The directors of the Liverpool Union Bank feel much disappointed that they have not been favoured with a remittance under Messrs. Gandell & Brunton's order of the 26th of December in their favour, and as a period of more than six months has elapsed since the order was given, they trust they may be excused in now asking for a statement of any monies received, and a remittance of the amount." At that time Mr. Westmacott had received from the managing committees of the several railways, on Messrs. Gandell & Brunton's account, divers large sums of money, which he had paid over to them, and on the 11th of July 1846, he wrote an answer as follows:—"In reply to your letter of the 9th of July, written on behalf of the directors of the Liverpool Union Bank, in reference to Messrs. Gandell & Brunton, we can only say, that we are informed that monies, considerably exceeding the order to which you refer, have been paid into the bank since that period."

There was some further correspondence respecting the claim of the bank, and also several interviews with Mr. Westmacott, who refused to give any account of the monies received on behalf of Messrs. Gandell & Brunton from the committees of the railway companies, and finally, on the 7th of December 1846, this bill was filed on behalf of the bank by its registered public officer, under the 7 Geo. 4. c. 46. s. 6, against Messrs. Gandell & Brunton, and also against Messrs. Pinniger & Westmacott. It stated the application to Messrs. Gandell & Brunton for payment of their account, or for some sufficient security, and that they offered to give the bank security by way of equitable assignment upon various large sums of money, which they repre-

sented to be due to them from the railway companies. It also stated the transaction of December 1845, and that such balance had never been reduced in amount, and that sums of money, which had since been received by the banking company on their account, had been again drawn out by means of bills, cheques or drafts by Messrs. Gandell & Brunton, which were duly honoured in reliance upon the faith of the security given to them by the letters of the 26th and 27th of December 1845, and that a very large sum had been, ever since the 26th of December 1845, due from Messrs. Gandell & Brunton to the banking company upon the balance of their account, which then amounted to the sum of 3,569*l.* 14*s.* 8*d.*, and that in respect thereof the plaintiff, on behalf of the banking company, claimed to have the benefit of the security to the extent agreed upon between the banking company and Messrs. Gandell & Brunton: that no part of the monies, which, at the date of the letter of the 26th of December 1845, were or which had since become due to Messrs. Gandell & Brunton from any of the railway companies, had ever been paid or received by the banking company, and that it had not hitherto had or received any benefit whatever from the security. And the bill charged that Messrs. Pinniger & Westmacott had, since the 25th of December 1845, received large sums of money from the railway companies on account of Messrs. Gandell & Brunton, and that they refused to pay over or account for the same to the banking company, and that Mr. Westmacott had admitted payment of monies to Messrs. Gandell & Brunton after the year 1845 on account of their claims on the railway companies to the total amount of 6,353*l.* 1*s.* 11*d.*, and that he had been repaid the greater part of such monies by persons interested in the said companies, and that such monies were paid on receipts of Messrs. Gandell & Brunton, or on the receipt of Mr. Westmacott, as their agent. And the bill prayed that it might be declared that the bank was entitled to have the full benefit of the letters of the 26th and 27th of December 1845, as an effectual charge, by way of equitable assignment, upon the several debts, claims and demands due to, or claimed by the said Messrs. Gandell & Brunton for or against

the several railway companies or undertakings mentioned in the letter of the 26th of December 1845, for the purpose of securing to the said bank such sum, not exceeding 3,000*l.*, as was then due to them from the said Messrs. Gandell & Brunton upon the balance of their banking account; and that the defendants, John Pinniger and Henry Seymour Westmacott respectively, might be decreed to account for, and pay to the said bank either the full sum of 3,000*l.* or the full amount of all sums of money received by them or either of them, or by any other persons or person through their means or procurement, or by their permission or connivance, or on their behalf, or which, without their own wilful neglect or default, they or either of them might have received on account of the debts, claims or demands of the said Messrs. Gandell & Brunton from the said several railway companies, or from any managing committee or committees, persons or person acting for or on behalf of the said railway companies.

On the 25th of January 1847 Messrs. Gandell & Brunton became bankrupt, and Charles Turner, the official assignee, and George Long and Charles Hutchins, the creditors' assignees, were brought before the Court by supplemental bill.

On the 9th of April 1847 Mr. Westmacott put in his answer, and said that his understanding of the transaction was, that whenever sums amounting to the balance due at the date of Mr. Lister's letter of the 29th of December 1845 should have been paid in to the account of the said Messrs. Gandell & Brunton with the bank, either by them or from any other source, all further claims on the part of the bank under or by virtue of the letters of the 25th and 26th of December 1845, or either of them, would be at an end. That as solicitor of the railway companies he obtained contributions from the provisional committees and applied them in protecting the companies from litigation and in payment of debts. That he made payments to Messrs. Gandell & Brunton and debited the companies therewith, and that the payments were made by him on account of the companies; that he had been repaid the greater portion of the monies, but that the repayments were entirely between him and his clients, and that Messrs. Gandell & Brunton had no-

thing to do with them otherwise than by receiving what was paid. That he believed there was no proposition to give any equitable assignment, and that the balance due from Messrs. Gandell & Brunton had been paid off by monies paid into the bank, and that they had not been drawn out on the faith of the security contained in the letters, though he believed that a large sum of money had been due to the bank from Messrs. Gandell & Brunton ever since the 26th of December 1845 upon the balance of their banking accounts. Mr. Westmacott also said he believed that the banking company placed implicit confidence in Messrs. Gandell & Brunton, and that he believed he did not run any risk in making payments to them. That Messrs. Gandell & Brunton had received considerable sums from the railway companies on account of the claims referred to in Mr. Westmacott's letter of the 27th of December, and that they still claimed considerable sums from the companies.

Mr. Pinniger, by his answer, said that he had for some time previous to these transactions ceased to take any active part in the business of his firm, and that his partnership with Mr. Westmacott was dissolved on the 31st of December 1845. That he knew nothing of the facts; that he had read the answer of Mr. Westmacott, and he believed it to be true, and prayed that it might be taken as a part of his.

Mr. Turner, Mr. Roundell Palmer, and Mr. Prior, for the plaintiff.—The questions to be determined in this case are, whether the letters of the 25th and 26th of December 1845 constitute an equitable assignment of the sums due from the several railway companies to Messrs. Gandell & Brunton, and if so, then whether the security is for the entire balance due to the banking company, or only for the sum of 3,000*l.*, and then, whether the monies paid into the bank, from time to time, by Messrs. Gandell & Brunton, after the date of the letters, to meet cheques drawn against them, are to be considered as having liquidated the balance of 3,000*l.* which was due to the bank. In *Lett v. Morris* (1) Mr. Morris agreed to pay to Mr. Greenaway 2,360*l.*

(1) 4 Sim. 607; s. c. 1 Law J. Rep. (N.S.) Chanc. 18.

by instalments; Mr. Greenaway signed and gave to Mr. Lett, for valuable consideration, a paper authorizing Mr. Morris to pay part of each instalment to Mr. Lett, whose receipt was to be a discharge to Mr. Morris. Notice of the order was served on Mr. Morris upon the day on which it was signed; it was held that the writing was an equitable assignment to Mr. Lett of the sums mentioned in it. The fund in this case, out of which the payment was to be made, was specified, and upon the direction given to Mr. Westmacott to pay the monies received into the bank the assignment was complete in equity—*Watson v. the Duke of Wellington* (2). In *Burn v. Carvalho* (3), and see *Carvalho v. Burn* (4), Fortunato had goods in the hands of Rego, his agent, at a foreign port, and being under liabilities to Messrs. Burn, he, by a letter to Rego, directed him to deliver certain goods to Vogeler, the agent of Messrs. Burn, at that port: it was held that Messrs. Burn had a good title to the goods, though Fortunato became a bankrupt while the letter was on its voyage. The same principle was followed in *Miln v. Walton* (5) and *Malcolm v. Scott* (6); but bankers have a general lien upon all securities in their hands for their general balance—*Davis v. Bowsher* (7), *Brandao v. Barnett* (8); and the conduct of the parties is most material, as shewing the sense they had of the transaction and of extending the security, and it might be further explained by evidence—*Ex parte Langston* (9), *Ex parte Kensington* (10), *Ex parte Ackroyd* (11), *Ex parte Alexander* (12), *Ex parte Skinner* (13) *Eden v. the Earl of Bute* (14), *Henniker v. Wigg* (15). Mr. Westmacott was, therefore, liable under the

letter he had sent, and so was Mr. Pinniger. They were connected in business as solicitors, and as one of the firm Mr. Pinniger was responsible, though he might be ignorant of the transaction, still Mr. Westmacott acted on his behalf and with his authority—*Young v. White* (16), *Young v. Guy* (17), *Blair v. Bromley* (18), *Sandilands v. Marsh* (19). This claim of the bank also was upon an agreement by Messrs. Gandell & Brunton to charge the balance of their account upon the debts due to them from the railway companies; at the time they had merely an interest expectant on the amount being ascertained; the agreement, therefore, bound that interest, and it was not barred by the bankruptcy of Messrs. Gandell & Brunton, previous to their acquiring an actual interest in the debts—*Lyde v. Mynn* (20). We ask, therefore, for an account of the monies received by Mr. Westmacott on account of Messrs. Gandell & Brunton; and in case he shall have received more than the sum of 3,000*l.*, then that Messrs. Pinniger and Westmacott may pay to the bank the sum of 3,000*l.*, for which the security was given. Mr. Pinniger, by his answer, refers to that of Mr. Westmacott, and asks that it may be read as his; it is, therefore, proposed to read parts of Mr. Westmacott's answer as Mr. Pinniger's.

[The MASTER OF THE ROLLS.—I think the proposition is correct, and I do not see how any objection can be taken to that course.]

Mr. Lloyd and Mr. Giffard, for Mr. Westmacott.—The question to be considered is, whether the contract entitled the plaintiff to file such a bill, and whether the contract was for a continuing security. If the contract was for a continuing security, there was no obligation to pay the money. The case at the bar differs from that made by the bill; it is not said that the account was an account current, but that the payments subsequently made to the bank were to meet specific cheques. The course adopted by the plaintiff is mistaken; no notice of

(2) 1 Russ. & M. 602; s. c. 8 Law J. Rep. Chanc. 159.

(3) 4 Myl. & Cr. 690; s. c. 7 Sim. 109; 9 Law J. Rep. (N.S.) Chanc. 65.

(4) 4 B. & Ad. 382; s. c. 1 Nev. & M. 700.

(5) 2 You. & C. C. C. 354.

(6) 6 Hare, 570; s. c. 14 Law J. Rep. (N.S.) Chanc. 57.

(7) 5 Term Rep. 488.

(8) 12 Cl. & F. 787, 806, 810.

(9) 17 Ves. 227.

(10) 2 Rose, 138.

(11) 1 Glyn & J. 391.

(12) Ibid. 409.

(13) 1 Deac. & C. 403.

(14) 3 Bro. P.C. 679, Toml. ed.

(15) 4 Q.B. Rep. 792.

(16) 7 Beav. 506; s. c. 13 Law J. Rep. (N.S.) Chanc. 418.

(17) 8 Beav. 147.

(18) 2 Phil. 354; s. c. 16 Law J. Rep. (N.S.) Chanc. 105, 495.

(19) 2 B. & Ald. 673.

(20) 1 Myl. & K. 683.

this supposed equitable assignment was ever given to the railway companies; the security was not general, but was limited, and was discharged by the subsequent payments to the bank. When a bond had been entered into by two persons for the payment of all such sums, not exceeding 3,000*l.*, which should be at any time thereafter advanced to a party, it was held not to be a continuing guarantie to the extent of 3,000*l.* for advances made at any time, but only a guarantie for advances once made—*Kirby v. the Duke of Marlborough* (21), *Melville v. Hayden* (22), *Hargreave v. Smea* (23). The bank had never informed Mr. Westmacott that there was any variation in the contract, neither did it think of the security until Messrs. Gandell and Brunton were on the eve of bankruptcy,—at that time all relief by assumpsit was extinguished. If a surety to a bond pays off the debt of his principal, he is merely a simple contract creditor, and not a specialty creditor of the principal—*Copis v. Middleton* (24), and see *Simpkins v. Poulett* (25). The contract therefore was extinct before the transaction, which was called an extension, and the only equity in this bill is a continuing contract. Messrs. Gandell and Brunton had no means to pay the balance but by the payments which were to be made to them from the railways, and the payments which had been made by them into the bank extinguished the demand.

Hammond v. Foster, 5 Term Rep. 635.

Bodenham v. Purchas, 2 B. & Ald. 39.

Field v. Carr, 5 Bing. 13; s.c. 2 Mo. & P. 46; 6 Law J. Rep. C.P. 203.

Simson v. Ingham, 2 B. & C. 65; s.c. 3 Dowl. & Ry. 249; 1 Law J. Rep. K.B. 234.

Mr. Walpole and Mr. Wray, for Mr. Pinniger.—Messrs. Pinniger & Westmacott were the solicitors of the railway companies, and on that account the joint names were used in this transaction. On the 31st of December 1845 they carried out the inten-

(21) 2 M. & S. 18.

(22) 3 B. & Ald. 593.

(23) 6 Bing. 244; s.c. 3 Mo. & P. 573; 3 Law J. Rep. C.P. 46.

(24) Turn. & R. 224; s.c. 2 Law J. Rep. Chanc. 82.

(25) 2 Law J. Rep. Chanc. 81.

tion previously agreed upon, and dissolved their partnership. There is nothing before the Court which shews that Mr. Pinniger was to be bound by the guarantie of Mr. Westmacott—*Duncan v. Lowndes* (26), *Hasleham v. Young* (27). The signature of Mr. Westmacott cannot bind Mr. Pinniger after the dissolution of the partnership, and the transaction itself is not within the scope of the partnership which existed; the bill, therefore, ought to be dismissed with costs against Mr. Pinniger.

Mr. Roupell and Mr. Kinglake, for the assignees of Messrs. Gandell & Brunton.—These are necessary parties, and are entitled to their costs.

Mr. Glasse for Messrs. Gandell & Brunton.

Mr. Roundell Palmer, in reply.—In a suit to determine the right to freight and earnings of a ship, the assignees of mortgagors, who were part owners of a ship, were held to be necessary parties, and not to be entitled to their costs—*Green v. Briggs* (28).

Nov. 14.—The MASTER OF THE ROLLS.—In this case, Messrs. Gandell & Brunton, who were engineers, were employed in the way of their profession by certain railway companies, against whom they claimed large sums of money to be due to them. Those companies employed the defendant, Mr. Westmacott, or Messrs. Pinniger & Westmacott, who were partners, as their solicitors, to settle the amount of the claims made against them by Messrs. Gandell & Brunton; at the same time, Messrs. Gandell & Brunton employed the Liverpool Union Bank, now represented by the plaintiff, their public officer under the statute, as their bankers, and became indebted to the bank in a large sum of money, payment of which was pressed for. In this state of things, Messrs. Gandell & Brunton desired that the debt which they owed to the bank should be secured by means of the debts which were owed to them by the railway companies; and it is alleged by the plaintiff that, in the month of December 1845, the

(26) 3 Camp. 478.

(27) 5 Q.B. Rep. 833; s.c. 13 Law J. Rep. (N.A.) Q.B. 205.

(28) 6 Hare, 632; s.c. 17 Law J. Rep. (N.A.) Chanc. 323.

debts due to Gandell & Brunton were in equity assigned to the bank as such security, to the extent of 3,000*l.* at least, and the relief sought by this bill is founded on that allegation.

Two questions are made: first, whether there was any such assignment as is alleged; secondly, whether such assignment became valid as a security for anything more than the sum of 3,000*l.*, which was actually due to the bank at the time when the security was accepted, either as against Gandell & Brunton, or the defendants, Messrs. Pinniger & Westmacott, or Mr. Westmacott alone.

There is no doubt but that a creditor, by ordering or directing his debtor to pay the debt to another person, may, in equity, effectually assign the debt to such other person; and it appears, by the case of *Burn v. Carvalho*, that an equitable assignment may be made effectual by a distinct promise and agreement to apply the fund in an agent's hands in a particular manner, and to give directions for that purpose to the agent. It is settled that in equity there may be a valid assignment of funds and property to be subsequently acquired, even in the case where the acquisition depends on contingencies and possibilities only.

In considering the evidence of the transaction which took place in this case, it is necessary to keep in view the position of the several parties. [His Lordship stated the circumstances of the case and the correspondence.]

It seems clear that the authority and direction given by the letter of Gandell & Brunton, extended to all the monies due from the railway companies to Gandell & Brunton, who appear to have so considered it.

It does not appear that Messrs. Gandell & Brunton ever did what in their letter they stated they had done, "send to London for a similar letter, covering only the amount of the advance to us, 3,000*l.*"

I am of opinion that, as the matter stood after the transaction of the 29th of December 1845, the security, whatever the nature of it was intended to be, was meant to extend only to the amount of about 3,000*l.*, including the sum previously due, and the sums to become due in payment of the drafts then consented to be paid; and that Mr. Westmacott, if he had received

3,000*l.* on account of the debts due by the companies to Messrs. Gandell & Brunton, and had caused the same to be paid to the bank, would have been justified, as against Gandell & Brunton, and would have been entitled to have his letter of the 27th of December returned to him by the bank.

Now, it appears that Mr. Westmacott did in point of fact on behalf of the companies, and by their direction, out of their fund, and on account of the debts due from them to Gandell & Brunton, pay to Gandell & Brunton in the early part of 1846 several sums of money, amounting to more than 3,000*l.*, notwithstanding his promise and undertaking contained in his letter of the 27th of December; he paid no part of this money to the bank, gave no notice to the bank, and permitted his letter of the 27th of December to remain in the hands of the bank. It is represented by him, and on his behalf, that in this transaction he acted only as the agent of the companies, made payments only by their order, and received nothing under the authority of the letter of the 27th of December. I am surprised such an evasion should have been attempted, and consider it quite clear, that although ordered by the companies to pay to Gandell & Brunton, he was bound to consider the monies that were received, or placed under his controul for the purpose of payment, as received by him on account of debts due to Gandell & Brunton from the companies, and subject to this undertaking, and that on making the payment to Gandell & Brunton, if his letter was only a promise or undertaking, he violated that promise or undertaking, and if it amounted to an assignment of the monies he should receive on account of the debts, he paid to Gandell & Brunton sums of money which he knew had been assigned to the bank, and which he had undertaken to pay to the bank on receipt.

The bank, notwithstanding the declared resolution in December 1845 to make no further advances to Gandell & Brunton, were, nevertheless, induced to act as their bankers, and receive and pay monies on their account. The subsequent receipts exceeded 3,000*l.*, but their subsequent payments were still greater; the balance of the running account was never paid, and when Gandell & Brunton became bankrupt they were very largely indebted to the bank.

From the subsequent dealings, I strongly incline to think that as between Messrs. Gandell & Brunton, and the bankers, the transactions were such as to extend the security, whatever was its nature, beyond the original intention, and to make it applicable to the balance at any time due to the bank. But it appears to me that the right of the plaintiff to any relief in this suit depends on the question, whether there was in the first instance an equitable assignment of the debts due from the railway company to Gandell & Brunton, or of so much of such debts as should be received by Mr. Westmacott.

If this is the case, Messrs. Gandell & Brunton had promised and agreed to assign to the bank the debts due to themselves from the railway companies, and to give to the railway companies the necessary direction for that purpose. The case of *Burn v. Carvalho*, which was mainly relied upon by the plaintiff, would have been authority for considering the transaction as an equitable assignment, notwithstanding a failure in the promised direction to the debtors.

The bill alleges that Gandell & Brunton, wanting forbearance or accommodation from the bank, proposed to give to the bank a charge by way of equitable assignment upon the debts due to them from the railway companies; that Mr. Lister, on behalf of the bank, agreed to accept such proposed security, and that Gandell & Brunton then requested Mr. Westmacott to concur in the proposed arrangement with the bank, that is, in the proposed charge by way of equitable assignment, which is alleged.

Now, Mr. Westmacott was the solicitor or one of the solicitors of the railway companies whose debts were in question, and was also about settling claims upon the companies, but it is not alleged that he had any interest in the debts, any authority to pay them, or any controul over the funds out of which they were to be paid, or that he was to have any consideration whatever for that which it was proposed he should do in the transaction, or that, in this particular matter, he was acting on behalf of the railway companies, but he was asked to concur in the proposed arrangement, that is, as I understand it, in the proposed charge by way of equitable assignment. This request, it is said, produced his letter of the 24th of December, which I have already mentioned.

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I think this was not a compliance with the request that he would concur in a charge by way of equitable assignment. It is a suggestion that an authority should be given to him to receive the debts, with a promise on his part to place the debts, when received, to the credit of Gandell & Brunton in account with the bank, and this is the suggestion which was acted upon. Messrs. Gandell & Brunton did authorize Mr. Westmacott to receive the debts, and did direct him to pay them, when received, to the bank, and Mr. Westmacott communicated this authority to the bank, and did promise to pay the money, when received, to the bank, according to the directions.

This is the transaction which Mr. Lister called the "guarantie" and Mr. Westmacott's share in which is by Mr. Gandell called his "undertaking." Neither party at that time called it a charge by way of equitable assignment, which it is by the bill alleged to be and to have been proposed and intended to be; and it seems difficult to ascertain the grounds on which the authority given to a person, who has no interest, to receive a sum of money belonging to another, and the promise of the same person to pay that money, when received, can be said to constitute an equitable assignment. There is no direction, nor any agreement to direct the companies to pay the debt to the bank, no direct agreement between Gandell & Brunton and the bank proved; but Gandell & Brunton authorized Mr. Westmacott to receive something in which he had no interest, present or future, vested or contingent; he had a mere authority from Gandell & Brunton, which was communicated to the bank with Mr. Westmacott's promise or undertaking. The cases of possible legacies, or of freight to be earned, appear to me to be very different, as in those cases there is a possible interest in the property upon which, when acquired, the assignment may operate, but Mr. Westmacott had nothing on which an assignment could operate. It does not appear that the mediation or interference of Mr. Westmacott was in any way required to make an equitable assignment; it might, and probably would, have been effected without it, by agreement, on the part of Gandell & Brunton with the bank, that the debts due from the railway companies to

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Gandell & Brunton should be charged with, or made applicable to the payment of the debts due to the bank, without the further agreement to give the necessary directions for that purpose. But this, whatever was the intention, was not the course pursued. It was not contended that any power of attorney authorizing a person to receive money, and directing him to pay it when received to the creditors of the party, would amount to an equitable assignment. And I am unable to come to the conclusion that the transaction, as it took place between Gandell & Brunton and the bank, amounted to an equitable assignment, or that the letter of Mr. Westmacott, acting for himself and his partner, was anything more than a promise or undertaking, for which he may have been, and may still be, legally responsible, but for breach of which the remedy is not in this court.

Considering the whole of the transactions, it is not without regret that I have come to the conclusion that the plaintiff is not entitled to relief in equity on this bill, but so thinking I must dismiss it. I shall dismiss it without costs as against Mr. Westmacott, and as against Mr. Pinniger also, who, although he seems to have had no knowledge of the transactions, was the partner, and connected with Mr. Westmacott at the commencement of the transaction, and desired the answer of Mr. Westmacott to be taken as part of his own answer. I think the plaintiff must pay the costs of Messrs. Gandell & Brunton occasioned by, and consequent upon, their being served with a subpoena to hear judgment, but no further, and that the bill must be dismissed with costs as against the assignees of the bankrupts.

K. BRUCE, V.C. { *In re* THE CAMBRIAN
Dec. 20. { GRAND JUNCTION RAIL-
WAY COMPANY.

Company — Winding-up Act, 1848 — Interim Manager.

By an order made on a petition presented under the Joint-Stock Companies Winding-up Act, 1848, a company was ordered to be wound up; and an interim manager was afterwards appointed. A petition was presented for discharging this order:—Held, that

the interim manager ought to be served with this petition.

An order was made, under the Joint-Stock Companies Winding-up Act, 1848, for the dissolution and winding-up of the Cambrian Grand Junction Railway Company.

By the 20th section of that act it is enacted, that, until an official manager should be appointed, the Master charged with the winding-up of the company shall be authorized to appoint a "person to be the interim manager of the property, assets, and effects of the company."

Under this section an interim manager had been appointed.

This was a petition to discharge the order made for the winding-up of the company.

On the petition being called on, it appeared that the interim manager had not been served.

Mr. Lloyd and *Mr. Surrage*, for the petition.

Mr. Glasse, for the petitioner in the original petition for the winding-up of the company.

K. BRUCE, V.C. said he thought that the interim manager ought to be served.

Mr. Glasse was afterwards instructed to appear for the interim manager.

L.C.	} <i>In re</i> THE NORTH OF ENG-	
Nov. 7.		LAND JOINT - STOCK
K. BRUCE, V.C.		BANKING COMPANY.
Dec. 22.	(<i>Sanderson's case.</i>)	

Company—Winding-up Act, 1848, and Winding-up Amendment Act, 1849—Appeal.

A motion, by way of appeal from a decision of a Master made under the Joint-Stock Companies Winding-up Act, 1848, was made to one of the Vice Chancellors, and decided by him on the 7th of July. A notice of motion, by way of appeal from the Vice Chancellor's decision, was given on the 8th of August, after the passing of the 12 & 13

Vict. c. 108. This motion was refused by the Lord Chancellor, on the ground of the notice of motion having been given more than three weeks after the decision of the Vice Chancellor; and that the 33rd section of the 12 & 13 Vict. c. 108, limiting the time within which notice of motion for a rehearing must be given, applies to orders made under the Joint-Stock Companies Winding-up Act, 1848. A motion before the same Vice Chancellor to rehear the original motion, was refused.

The Master charged with the winding up of the North of England Joint-Stock Banking Company had inserted Mr. Sanderson's name in the list of contributories in respect of fifty shares. Mr. Sanderson, by motion, appealed from the Master's decision to Vice Chancellor Knight Bruce, and, by an order dated the 7th of July 1849, and made by his Honour on this appeal, Mr. Sanderson's name was placed on the list of contributories in respect of the fifty shares, but with a limited liability. The case is reported on this point in 18 *Law J. Rep.* (N.S.) Chanc. 248.

By the Joint-Stock Companies Winding-up Amendment Act, 1849 (12 & 13 Vict. c. 108. s. 33.) it is enacted, "That no notice of motion for a rehearing, before the Lord Chancellor of Great Britain or Ireland respectively, of any order of the Master of the Rolls in England or Ireland, or of any of the Vice Chancellors in England, under the said act or this act, shall be given, after the expiration of three weeks after the order complained of shall have been made."

This act was passed on the 4th of August 1849.

A notice of motion of an appeal to the Lord Chancellor was given on behalf of the official manager of the company on the 8th of August 1849, being thirty-two days from the decision of the Vice Chancellor Knight Bruce.

On the 7th of November the appeal came on before the Lord Chancellor, who dismissed it, on the ground that the official manager had been precluded from appealing by the 33rd section of the act before mentioned.

A motion was afterwards made to Knight Bruce, V.C. to rehear the original motion made before him on the 7th of July.

Mr. Bacon and Mr. Headlam for the motion.

Mr. Russell and Mr. Taylor, for Mr. Sanderson, were not called upon.

KNIGHT BRUCE, V.C. said that he thought that it was inconsistent with the spirit of the judicial construction which had been put on the 33rd section to rehear the motion, which must, therefore, be refused.

K. BRUCE, V.C. { *In re* THE PATENT ELASTIC PAVEMENT AND KAMPTULICON COMPANY.
Jan. 17.

Company — Winding-up Act, 1848 — Deposit of Shares—Contributory.

A number of shares of 1l. each in a company were deposited with A, by way of security for money due to him. A. having received notice that, by a resolution of the company, every ten shares of 1l. each had been converted into one share of 10l., brought the shares to the company's office and received back the new shares in exchange. The company was wound up under the Joint-Stock Companies Winding-up Act, 1848:—Held, that A. was liable in respect of the shares.

In 1846, 570 shares of 1l. each in the Patent Elastic Pavement and Kamptulicon Company were deposited with Messrs. Price & Brown, who were bill-brokers, to secure certain sums of money due to them.

In 1847 a notice was received by Messrs. Price & Brown, that, by a resolution of the company, every ten shares of 1l. each had been converted into one share of 10l., and that the holders of the 1l. shares were required to bring their shares to the office of the company to have the exchange of shares effected. At this time a dividend had been declared on the shares.

In March 1847 Messrs. Price & Brown brought the 570 shares to the office, and received, instead thereof, fifty-seven new shares of 10l. each. At the same time four new shares of 10l. each were delivered to them instead of the dividend then due on the 570 shares.

In the books of the company these entries were made:—"Names—Price & Brown—

address, &c.—30th of March 1847—to whom delivered 57 shares—813 to 867—to whom also delivered 4 shares to pay the dividends on 57 shares." It was, however, stated by Messrs. Price & Brown that these entries were made without their authority.

The company was ordered to be wound up under the Joint-Stock Companies Winding-up Act, and the Master charged with the winding up of the company put the names of Messrs. Price & Brown in the list of contributories in respect of sixty-one shares.

From this decision Messrs. Price & Brown now appealed.

Mr. Bacon and Mr. Lewis, for Messrs. Price & Brown.—The persons to be put on the list are the actual owners of the shares. Messrs. Price & Brown are not the owners. The shares were merely deposited with them by way of security, and were received by them without any intention on their part of being fixed with any liabilities in respect of them. After the deposit they might have made themselves owners of the shares. They have not, however, done so. It may be contended that what has been done by them amounts to the making themselves owners. This is, however, not the case. The fifty-seven shares, in fact, are merely the 570 old shares with a new name, and the relations of the holders of the shares to the company were not intended to be affected, and were not affected, by the exchange. Messrs. Price & Brown in giving up the old, and taking the new, shares acted, not so much on their own account, as on behalf of the holders who had made the deposits. As to the four shares, they were in lieu of dividends, and, being the produce or income of the old shares, ought to follow the principal from which they were derived. The case, however, may be different as to them. It is contended then, first, that Messrs. Price & Brown are not liable in respect of any of the sixty-one shares; and, secondly, that if they are liable in respect of the four, they are not liable in respect of the fifty-seven.

Mr. Russell, for the official manager, was not called upon.

Knight Bruce, V.C. said, that he agreed with the conclusion at which the

Master had arrived; and that Messrs. Price & Brown must remain on the list for the sixty-one shares.

K. BRUCE, V.C. { *In re THE ST. GEORGE'S*
Jan. 24. { STEAM PACKET COM-
PANY.
(*Litchfield's case.*)

Company — Winding-up Act, 1848 — Contributory—Infant.

A party entitled to shares in a steam-packet company, transferred them to his son, who was then a minor. In the deed of settlement of the company it was provided that minors might vote by their guardians. It was admitted that the son had taken some free passages as a proprietor, and that, in the tickets given him for that purpose, he was described as "Master L." On coming of age, having done no act of acceptance of the shares after his majority, he repudiated them. The company was wound up under the Joint-Stock Companies Winding-up Act, 1848:—Held, that the father was liable as a contributory in respect of these shares.

Mr. William Litchfield, being the holder of two shares in the St. George's Steam-Packet Company, by a deed of transfer, dated the 18th of January 1841, "in consideration of value" assigned these shares to his son Clayton Litchfield. Clayton Litchfield executed this deed of transfer, whereby he "agreed to accept the shares." He was then registered as a shareholder under the description of "Clayton Litchfield, Esq., of Cork." Clayton Litchfield was at this time only seventeen years of age.

The 50th and 51st sections of the deed of settlement of the company were as follows:—

Clause 50.—"That in case any proprietor entitled to vote at any such meeting as aforesaid shall be a lunatic or a minor, such lunatic shall or may vote at such meeting by his or her committee, and such minor shall or may vote by his or her guardian, or by any such guardian; provided that every such committee or guardian may also vote in right of his own share, as well as in the character of committee of any lunatic,

or of guardian of any minor on the same occasion."

Clause 51.—"That the person by whom, or in whose name, any shares shall be held or stand, shall to all intents and purposes whatsoever within the meaning of these presents, be deemed at law and in equity the absolute, sole, and beneficial owner and holder of such shares; and shall, as such, be the only person known to or recognized by the company in all votes, transfers, notices, payments, receipts, and other matters relating to the same shares, and the company shall in no case be bound to notice, or be affected with express notice of any trust or equitable charge imposed on any shares; and further, that whenever several persons shall be jointly possessed of, or entitled to any share or shares in the said company, the person whose name shall stand first in the books of the said company as proprietors of such share or shares shall in all votes, notices, payments, receipts, and other matters and things relating to the same share or shares be deemed and be taken to be the proprietor of such share or shares."

According to the rules of the company every proprietor of shares in the company was entitled to free passages in the company's boats. This privilege was exercised by the proprietors applying at the office of the company, at the place from which any boat started, for, what was called, "a proprietor's ticket" (1). In the written admissions entered into on behalf of the company on this motion, it was stated that Clayton Litchfield was in the habit of taking free passages, as proprietor, in the ships of the company, and that, in the pass tickets, he was described as "Master Litchfield." One of the tickets was produced, in which was the statement following:—"Master Clayton Litchfield, of Cork, is a proprietor in the St. George's Steam Packet company, and holds stock to the amount which entitles him to free passages in the ships of the company trading coast-ways." This ticket was dated in 1840; whereas Clayton Litchfield did not execute the deed of transfer until 1841. There

was no direct evidence that the company knew that Clayton Litchfield was a minor at the time he executed the deed of transfer.

During Clayton Litchfield's minority two dividends were paid by the company. Both were received by John Litchfield, who was a brother of Clayton Litchfield. One of these receipts was signed, "Clayton Litchfield per John Litchfield"; the other "for Clayton Litchfield, John Litchfield." It was stated by John Litchfield in an affidavit made by him that he had received these dividends, and had not paid them to his father.

In 1845 Clayton Litchfield attained his majority. There was no act of acceptance by him of these shares after his majority, and he in fact repudiated them.

The company was directed to be wound up under the Joint-Stock Companies Winding up Act, 1848. The Master having put the name of Mr. William Litchfield on the list of contributories in respect of the two shares, this was a motion, by way of appeal, that his name should be excluded from the list.

Mr. Lloyd and Mr. Hetherington, for the motion.—First, according to the constitution of the company, as appears by the 50th and 51st sections of the deed of settlement, minors may be shareholders. The company having then declared that minors may be shareholders, whether Clayton Litchfield is or is not liable to them in respect of the shares, it does not lie in their mouths to say that he is not a shareholder, or that any one else is a shareholder in respect of the shares. Secondly, however this may be, it must be taken that the company knew that Clayton Litchfield was a minor. Here is a ticket on which he is described as "Master Litchfield," a term peculiarly belonging to minority, and which is not applicable to a person who has attained his majority. The written admissions are to the same effect. Knowing him then to be a minor, and accepting him, notwithstanding his minority, they cannot now reject him. The doctrine as to the contracts of partnerships entered into by infants is that, although such contracts may be avoided by an infant on coming of age, the person with whom he contracts is bound by all the consequences

(1) In re The St. George's Steam Packet Company (*Maguire's case*), 18 Law J. Rep. (N.S.) Chanc. 256.

—*Warwick v. Bruce* (2), *Bruce v. Warwick* (3). This is, in fact, a partnership for trading purposes. Thirdly, there is no evidence that the father transferred the shares with any view to his own benefit. It is in evidence that the dividends which were paid in respect of the shares were not paid to him.

Mr. Bacon and *Mr. J. V. Prior*, for the official managers, were not called upon.

KNIGHT BRUCE, V.C.—How this case would have stood if it had been proved that the company, or the persons authorized to act on their behalf, had notice that this gentleman was a minor, and, notwithstanding such notice, had accepted him as a partner, I need not say. There is here no case of notice. The consequence is, that, notwithstanding that strange clause in the deed of settlement mentioned by *Mr. Lloyd* (4), whatever it may mean, the father has not, in my opinion, shewn a case in which he has discharged himself of his liability to the company; and he remains as liable as ever he was.

I agree with the Master without reference to the question as to the receipt of the dividends after the execution of the deed of transfer, and my decision would be the same in whatever way that question might be answered. It is, of course, admitted that *Clayton Litchfield* has done no act since his majority to make him liable in respect of the shares. The motion must be refused, with costs.

V.C. }
Jan. 15. } SCARISBRICK v. SKELMERSDALE.

Accumulation, Trusts for — Devise — Remoteness.

A testator, by his will, dated in 1806, devised an estate to trustees upon trust to settle the same to the use of such trustees for 2,000 years, and subject thereto to his children in manner therein mentioned; and the testator declared the trusts of the term to be, in trust to pay to any child who, under the limitations therein declared, should for the time being be entitled to the possession or rents of his

*estate, and who, having attained twenty-one, should be under twenty-five years of age, an annual sum of 500*l.* until he should attain twenty-five or die under that age, and in the next place in trust to receive the surplus as well during the minority of every person so for the time being entitled as during such time as any such person should be under twenty-five years, and to accumulate the same, and at the end of every or any such period of accumulation to apply the funds so accumulated towards payment of his debts and legacies:—Held, that the trust for accumulation exceeded the boundary of legal limits, and was void.*

This suit was instituted for the purpose of obtaining the opinion of the Court upon the construction of the will of *Thomas Eccleston, Esq.*, the father of the plaintiff, *Charles Scarisbrick*. The testator died in November 1809, and by his will, dated the 14th of October 1806, devised his three estates, therein designated as his *Scarisbrick estate*, his *Wrightington estate* and his *Eccleston estate*, to trustees upon trust, as to his *Scarisbrick estate* to settle the same to the use of the trustees for 1,000 years, and subject thereto to his first and other sons successively and their issue, and then to his first and other daughters and their issue in strict settlement, with limitations over, and the ultimate remainder to his own right heirs; and the testator declared one of the trusts of the term of 1,000 years to be, that the trustees should, during the twenty years to be computed from his death, levy and raise out of the rents, issues and profits of the said estates an annual sum of 1,000*l.* to be accumulated upon government or real securities, and the accumulation thereof to be applied in or towards payment of his funeral expenses, debts and legacies; and upon trust as to his *Wrightington estate* to settle the same to the use of the same trustees for 2,000 years, and subject thereto to his second son *William* for life, remainder to the first and every other son of the said *William* in tail male; remainder to his third son *Charles* (the present plaintiff) and every other subsequently born son in order of birth for life, remainder to the first and other sons of the said *Charles* and every other subsequently born son successively in tail male,

(2) 2 M. & S. 205.

(3) Same case in error, 6 Taunt. 118.

(4) The 50th clause.

remainders over. And the testator did the trusts of the term of 2,000 in the Wrightington estate to be, other things, in trust to pay to any of his body or the issue of such child under the limitations of the settlement should for the time being be entitled possession or rents of his Wright-estate, and who, having attained twenty-one, should be under the age twenty-five years, an annual sum 200*l.* until he should attain the age twenty-five years or die under that age, the next place in trust to receive the residue which should remain of the rents, the hereditaments comprised in the term of 2,000 years after answering trusts and purposes aforesaid as well as the minority or respective minority of every person so for the time being as aforesaid, as during such time as he should be under the age of his body, so for the time being as aforesaid, should be under the age of twenty-five years, and to accumulate the same in manner thereinbefore provided, and at the end of every or any period of accumulation to apply the same so accumulated in or towards payment of his funeral expenses, debts and legacies. And upon trust as to the Eccleston estate that the trustees should by sale or mortgage of the same or a competent part thereof, and out of the rents in the meantime such money as they should think proper or expedient, and apply the same towards the satisfaction of the testamentary expenses, debts and legacies, the next place in payment of 5,000*l.* to his fourth and every subsequently born son, and for each of his daughters. The testator declared that in case the residue of his Eccleston estate should not be mortgaged, and the residue after trusts and purposes before directed to have been answered should not be the value of 15,000*l.*, or in case the residue should have been sold or mortgaged, in case the residue of the monies to come from the sale and the equity of redemption of the mortgaged estates after answering trusts and purposes aforesaid should exceed 15,000*l.*, the trustees should possess of such residue in trust for the first son Charles, or such subsequently born of his body as should first attain

twenty-one or die under that age, leaving issue, his heirs, executors, administrators and assigns; and in case the testator should leave only two sons, in trust for the eldest of such sons, his heirs, executors, administrators and assigns respectively. But in case such residue should exceed 15,000*l.*, then the testator directed that such parts of such residue as should consist of money should be laid out in the purchase of land, and that as well the land so purchased as the residue of his Eccleston estate which should not have been sold, and the equity of redemption of such part thereof as should have been mortgaged, should thenceforth go and remain to the use of his third son, and every other subsequently born son of his body successively in order of birth, without impeachment of waste, for life, and after his respective decease to the use of his respective first and other sons successively in tail male, with a limitation over to the testator's first and second sons, and to his daughters and their issue in strict settlement, with other limitations over.

The will also contained a clause for marshalling the funds, which was in these words: "And whereas I have hereinbefore provided several funds for the payment of my funeral expenses, debts, and legacies, among which debts I include all sums of money charged on my estates, either by myself or any of my ancestors, or to which I am otherwise subject and liable: now, I do hereby declare that the same shall be successively resorted to in the manner hereafter mentioned, that is to say, as between strangers and my said trustees, and the persons claiming under this my will, my said trustees or trustee for the time being shall have the fullest discretion and liberty to resort to the said funds in such order and course as they or he shall think proper. But that as between the several persons claiming under this my will, the said funds shall be liable in the order and course of succession hereinafter mentioned, that is to say, such of my estates as are now charged with annuities shall be solely and exclusively subject to the payment of the same, and all such annuities or yearly sums for which I have given any security shall be solely and exclusively charged on the estates in respect of which they become payable respectively. But as to all my other debts and all my legacies, except

those given by me to my said children, my said personal estate shall be the fund first to be resorted to. The said annual sum of 1,000*l.* hereinbefore directed to be secured on my said Scarisbrick estate for twenty years successively after my decease, shall be the fund secondly to be resorted to. The rents and profits of my said Wrightington estates, and my estate purchased from Mr. Hill, hereinbefore directed to be received by trustees during such time as the child for the time being entitled to the actual possession thereof shall be under the age of twenty-five years, shall be the fund to be thirdly resorted to. The monies to arise from the sale of my said Eccleston estate shall be the fund fourthly to be resorted to. The said term of 2,000 years hereinbefore directed to be created in my said Wrightington estates, and my estates purchased from Mr. Hill, shall be the fund fifthly to be resorted to. And the said term of 1,000 years, hereinbefore directed to be created in my said Scarisbrick estates shall be the fund sixthly and lastly to be resorted to. And as to the legacies first hereinbefore bequeathed by me to my said children, the funds provided for the payment of the same shall be resorted to in the manner hereinafter mentioned, that is to say, the money to arise from the sale of my Eccleston and Sutton estates shall be the fund to be firstly resorted to. The term of 2,000 years in my Wrightington estate, purchased from Mr. Hill, shall be the fund to be secondly resorted to; and the term of 1,000 years in my Scarisbrick estates shall be the fund to be lastly resorted to. And as to the additional portions of 5,000*l.* each hereinbefore bequeathed by me to my children, the said term of 1,000 years in my Scarisbrick estates shall be the sole fund for the payment of the same; and as to the legacy of 15,000*l.*, or such part thereof as shall become raiseable under the trusts aforesaid, the said term of 2,000 years in my said Wrightington estate, and the estate purchased from Mr. Hill, shall be the sole fund for the payment of the same; and, therefore, if any of the said funds shall be resorted to out of the order hereinbefore prescribed, the fund or funds first answerable shall replace, reprice, or make good to the fund or funds so resorted to what shall have been so irregularly or out of order sub-

tracted from such fund or funds respectively."

The testator had three sons and four daughters. His eldest son died in July 1833, without issue; his second son William died also, without issue, after the date of the will, and only a few weeks before the testator; and his third son Charles, the present plaintiff, became entitled as tenant for life to the Wrightington estate, and as the Eccleston estate exceeded 15,000*l.* in value he became entitled to that also as tenant for life. On the death of Thomas, the eldest son of the testator, the plaintiff became also entitled as tenant for life to the Scarisbrick estate, and was consequently now tenant for life of all three estates.

The testator at the time of his death was largely indebted. His debts, legacies and annuities, and interest thereon from the time of his death to the time of payment, amounted altogether to 150,135*l.* The proceeds of the personal estate amounted to about 85,000*l.*, leaving to be provided for out of the other funds the sum of 115,135*l.*

The questions now raised were, first, whether the plaintiff was entitled to the principal money and interest arising from the accumulations of the surplus rents of the testator's Wrightington estate up to the time at which he attained the age of twenty-five, amounting in the whole to 31,687*l.* 10*s.* 8*d.*, on the ground that the direction to make such accumulation was void *ab initio*, because it exceeded the boundary of legal limits as established before the passing of the stat. 40 Geo. 3. c. 98.

Secondly, in the event of such direction being valid, whether the plaintiff, as tenant for life of the testator's Eccleston estates, was entitled to the interest and income amounting to 3,322*l.* 16*s.* 6*d.*, arising from such surplus of the Wrightington rents up to the period at which he attained twenty-one.

Mr. Bethell and Mr. C. Hall, for the plaintiff, said, as regarded the first point, it would be seen that the testator had directed the surplus rents of the Wrightington estate to be accumulated during the period that any of his children, who should be entitled as tenant for life in possession, should be under the age of twenty-five, and during the minority of any other person

entitled as tenant for life, or in tail; and that the funds arising from such accumulations were only to be applied for the purposes of the will at the end of every or any period of accumulation. Now, if this direction to accumulate were held to be a valid direction, it might continue by a succession of minorities for centuries. The youngest child of the testator at the date of the will was only five years old, and the will contemplated and expressly provided for after-born sons and daughters, and each of these children and their issue might have succeeded, either as tenants for life or in tail, to the Wrightington estate. The utmost limit to which a trust to accumulate could be extended prior to the passing of the Thellusson Act was for a life or lives in being, and twenty-one years and nine months afterwards. It would be seen that in this case the period of accumulation might travel through minorities for a considerable time; for instance, suppose the testator's son William, or the plaintiff, or any of the other existing or after-born children who should become entitled as tenants for life, should die under the age of twenty-five leaving a child six months old, and that child should marry and die under twenty-one leaving a child under six months old, and that should continue for several generations, it was evident that if this direction to accumulate could be held to be valid, the rents of the Wrightington estate might be accumulated and tied up to a period distant 200 years from the death of the testator, and for a period of a life or lives in being, and 100, 200, or 300 years afterwards. This case was similar to that of *Lord Southampton v. the Marquis of Hertford* (1). The case of *Broune v. Stoughton* (2) was, if possible, a stronger case than the present. The following cases were also in point—*Ware v. Polhill* (3), *Boughton v. James* (4). *Lewin on Trusts*, p. 114, 2nd edit. was also referred to. It was on these grounds contended that this trust to accumulate was void *ab initio*, that it did not come within the operation of the Thellusson Act, and that it could not to any extent be carried into

effect; and that the plaintiff from the death of his father became entitled as tenant for life of the Wrightington estate to the whole rents and profits of that estate; and that, consequently, he was entitled to receive the whole of the surplus rents which had been accumulated, and the interest and income thereof. On the second question raised by this suit, it was contended, that in the event of the trust for accumulation being valid, the plaintiff as tenant for life of the Eccleston estate was entitled to the interest and income arising from the surplus rents of the Wrightington estate.

Mr. J. Parker, Mr. Malins and Mr. Toller, for the trustees, contended that this was substantially a trust for the payment of debts, and was therefore excluded from the operation of the provisions against perpetuity laid down by the Thellusson Act, and excluded by the 2nd section of that act; consequently, it was not governed by the decisions quoted on the other side. The following cases were cited in support of this view—*Bankes v. Le Despencer* (5), *Tollmache v. the Earl of Coventry* (6), *Ferrand v. Wilson* (7), *Marshall v. Holloway* (8), *Mackworth v. Hinzman* (9), *Longhead d. Hopkins v. Phelps* (10), *Doe d. Herbert v. Selby* (11), *Humberston v. Humberston* (12), *Seaward v. Willock* (13), *Crompton v. Barrow* (14). Upon the second point, it was contended that the trustees were justified under the trusts of the 2,000 years term in the Wrightington estate and the marshalling clause in applying the rents of that estate in paying the debts of the testator. That nearly all the debts of the testator having been paid prior to 1814 out of the various funds, it became necessary to accumulate the surplus rents of the Wrightington estate for the purpose of recouping the Eccleston estate the amount of debt borne out of the order laid down by the testator.

(5) 10 Sim. 576; s. c. 9 Law J. Rep. (N.S.) Chanc. 185.

(6) 8 Bligh, 547.

(7) 4 Hare, 344; s. c. 15 Law J. Rep. (N.S.) Chanc. 41.

(8) 2 Swanst. 482.

(9) 2 Keen, 658; s. c. 5 Law J. Rep. (N.S.) Chanc. 127.

(10) 2 W. Black. 704.

(11) 2 B. & C. 926.

(12) 1 P. Wms. 332.

(13) 5 East, 198.

(14) 4 Ves. 681.

(1) 2 Ves. & B. 54.

(2) 14 Sim. 369; s. c. 15 Law J. Rep. (N.S.) Chanc. 391.

(3) 11 Ves. 257.

(4) 1 Coll. 26.

That the direction to accumulate applied not only to the rents, but also to the income which arose from investment of the rents by way of compound interest. That unless this were the true construction of the direction to accumulate, a question might arise whether the income arising from the investment of rents was disposed of by the will. That the direction to apply the accumulated fund in the Wrightington estate in paying debts, coupled with the previous trust and with the discretionary powers in the marshalling clause, was meant to apply to debts which might have been previously paid out of funds not primarily applicable. That such course having been anticipated by the testator, he wished to provide a fund to recoup his son Charles (the plaintiff) on his attaining twenty-five the sums applied out of the Eccleston estate in paying debts, while in the mean time provision was made for his maintenance out of the Scarisbrick estate, and a sum was also provided for him out of the Wrightington estate on his coming of age, in the possible event of the whole of the Eccleston estate being previously exhausted.

The VICE CHANCELLOR. — I thought I could not better employ some portion of the leisure I had during the late vacation than in looking into this case, which I did very deliberately; and it appeared to me, as it has done all through, that where the testator has directed a specific thing to be done, then that thing must be done, and it would require very strong language to say that where he has used general expressions as to what he will have done by way of conveyance, these expressions shall be taken to overrule and cut down what he has deliberately and positively, as a part of his own will, himself expressed. It occurred to me when the case was argued, before Christmas, that the testator has made an express direction in the ninth clause (speaking of the term of 2,000 years). There he says, "as well during the minority or respective minorities of any person so for the time being entitled to the residue, as during such time as any child so for the time being entitled as aforesaid should be under the age of twenty-five years," and so on. It appears to me that inasmuch as the testator has expressly directed what shall

be the trust in respect of the minority of any person not his child, he has thereby fettered and bound down the trustees to take care that that thing which he has himself directed, shall be made part of the very trust which they are to carry into execution; and it appears to me that if the rule of law is that it cannot take effect, then the whole must perish together. In order that I might save the time of the Court, I took particular pains to go through a great number of cases connected with this subject; and I think the only way to decide is, that where the second part of the will is made by the testator a constituent part of the will, so that you cannot strike it out, but must admit it, if that part fails there is an end of the matter. This will consequently amount to a declaration that the trust for accumulation is void, and this decision will also dispose of the other questions arising under the will.

K. BRUCE, V.C. }
Jan. 26.

BEECH v. EARL ST.
VINCENT.

Accumulation—Portions—Thellusson Act.

A testator devised real estates to trustees, for the term of ninety-nine years, upon trust, to raise 2,000l. a year for so much of the life of J. B. as should fall within twenty-one years from the time of his death, and during such other time as there should be in existence a younger child of J. B. and to invest and accumulate the said annuity, and to stand possessed of the fund for the benefit of the younger children of J. B. The testator then devised the estates, so subject to J. B. in strict settlement. J. B. survived the testator:—Held, that the gifts for the younger children of J. B. were portions within the meaning of the 2nd section of the Thellusson Act.

James Beech, by his will dated the 1st of September 1821, devised his real estates therein mentioned to E. L. Rickets, Earl St. Vincent, R. C. Hill and R. Swann, and their heirs, to the use of E. L. Rickets, R. C. Hill, and R. Swann, their executors, administrators and assigns, for the term of ninety-nine years, to commence from the day of his decease, and

and the trust as follows, "upon trust they my said trustees or the survivor of them, and the executors and administrators of such survivor shall by means of the rents, issues and profits of the hereditaments and premises comprised in the said term, or by lease, sale or other disposition thereof, competent part thereof, for all or any part of the same term, or by bringing an action against the tenants or occupiers of the said premises, or by making entries upon, or by any other lawful ways or means which they or he shall think fit, to raise, during so much of the life of my son James Beech as shall remain in the period of twenty-one years after the time of my decease, and also at such other time or times of the life of the said James Beech as there shall be in the said term, and actually born any children of the said son, entitled by virtue of the hereinafter declared to the benefit of the said sum to be accumulated from time to time, an annuity or clear yearly sum of £2,000 of lawful money of Great Britain, free of all deductions whatsoever, for or otherwise, on the 24th day of November in every year, the first payment to be made on such of the said days of November as shall next happen after my decease shall come into possession of the said sum; and I declare that the said annuity or yearly sum is to be received, held and paid by my said trustees upon the trusts hereinafter declared of and concerning the said sum." The testator then devised his estate, subject as aforesaid, to the use of his son James Beech for his life, with remainder to his first and other sons in tail, with reversion over. The will then contained a declaration of trust as to the term of twenty-one years as follows—"I declare that the said annuity or yearly sum of £2,000, hereinbefore given to my son, the said E. L. Rickets, R. C. Hill, and Swann, during the period aforesaid, shall be paid to them, upon trust that they or the survivor of them or the executors or administrators of such survivor, from time to time, lay out and invest the said sum in the purchase of a competent part of the parliamentary stocks or public securities of Great Britain, or upon mortgage or other real security, and from time to

time alter, vary and transpose the said securities as they or he shall think fit, and receive and take the interest, dividends, and yearly proceeds thereof, when and as the same shall become payable, and lay out, invest, and transpose the same in like manner as the principal monies, so that the whole thereof may accumulate in the way of compound interest until the decease of the said James Beech, and then upon trust to stand possessed of the whole of the accumulated fund, in trust for all and every the younger children of the body of the said James Beech, exclusively of an eldest or only son, to be paid to such younger children, or any one or more of them, at such age or ages, &c. as the said James Beech by any deed or deeds in writing, or his will, or any codicil or codicils thereto, to be by him signed and published in the presence of two witnesses, shall appoint; and in default of such appointment, &c. then the said accumulated fund to be equally divided between all such younger children, except as aforesaid, the shares of sons to be paid at their respective ages of twenty-one years, and of daughters at their respective ages of twenty-one years or days of marriage, which shall first happen." The testator then gave the accumulated fund, in default of younger children, in trust for the executors, administrators and assigns of the said James Beech, as part of his personal estate.

The testator died on the 30th of October 1828, leaving James Beech, his son, his heir-at-law. James Beech, the son, married shortly after the death of the testator, but never had more than one son, who was tenant in tail in remainder of the devised estates. The term of twenty-one years ended on the 30th of October 1849, and the trustees had standing in their names the sum of £41,556*l.* 9*s.* 1*d.* 3 per cent. consols, which had arisen from the annuity and the accumulations.

The bill, which was filed by James Beech against the trustees, prayed for a declaration that he was entitled to the income accrued and to accrue due on the £41,556*l.* 9*s.* 1*d.* 3 per cent. consols from the 30th of October 1849.

By the 39 & 40 Geo. 3. c. 98. (commonly called the Thellusson Act) it was enacted, "that no person should settle

any property so that the produce thereof should be accumulated for any longer term than the term of twenty-one years from the death of any such settlor; and, in every case where any accumulations should be directed otherwise than as aforesaid, such directions should be null and void, and the produce of such property so directed to be accumulated should, so long as the same should be directed to be accumulated contrary to the provisions of this act, go to and be received by such person as would have been entitled thereto if such accumulation had not been directed."

The second section is as follows:—"Provided always, and be it enacted, that nothing in this act contained shall extend to any provision for payment of debts of any grantor, settlor, or devisor, or other person or persons; or to any provision for raising portions for any child or children of any grantor, settlor, or devisor, or any child or children of any person taking any interest under such conveyance, settlement, or devise, or to any direction touching the produce of timber or wood upon any lands or tenements, but that all such provisions and directions shall and may be made and given as if this act had not passed."

The only question in this case was, whether the gifts for the younger children of Mr. Beech came under the term "provision for raising portions for children of any person taking an interest under a settlement" in the 2nd section of the act.

Mr. Bacon and *Mr. Campbell*, for the plaintiff.—First, the word "portions" in the 2nd section must be taken to be portions then in existence, and not portions to be created by the instrument. The word "portions" is connected with the word "debts," and "debts" must mean the debts then in existence. Secondly, the gifts contained in the will of the testator cannot properly be taken to come under the word "portions," as that word is used in law reports and text books. Thirdly, the word "children," mentioned in the second section, must be taken to be children then in existence, and not children to be born after the settlement. For all or any one of these reasons, the case does not come under the exceptions in the 2nd section, and is, therefore, covered by the language of the 1st section. They cited—

Eyre v. Marsden, 2 Keen, 564; s. c. 7 Law J. Rep. (N.S.) Chanc. 220; and
Halford v. Stains, 13 Jur. 73.

Mr. Malins and *Mr. Cracknall*, for the trustees.

Mr. Wigram and *Mr. A. J. Lewis*, for the other parties, were not called upon.

Knight Bruce, V.C.—Independently of the act of the 39 & 40 Geo. 3. the accumulations in question are plainly well directed, and cannot be stopped, and the demand made in this suit is wholly unsustainable. The question then is, whether this is a case which comes within the provisions of the act. Now, the 2nd section of the act takes out of the 1st section certain cases, and these are as if the act had never been passed. Is this case, then, within the 2nd section? In this section is an exception as to "the provision for raising portions for the child or children of the settlor or any person taking an interest under the settlement." It has been contended that these words ought to be construed as referring merely to portions then in existence, and already charged upon property, independently of the instrument to be construed. I think, however, that this is an inadmissible construction, and that "the provision for raising portions" in this section ought to be taken to extend to provisions for raising future portions which have their existence only by means of the instrument itself.

The next question is, whether the word "portions" is applicable to a gift of this description. The testator appears to have been a person of large landed property, and he makes his son tenant for life of his property, subject, however, to this—that an annuity of 2,000*l.* a year was to be raised, and to be deducted from the income during twenty-one years, and during so much longer time of his son's life as his son should happen to have any daughter or younger son alive. The 2,000*l.* then to be raised during that time is to be laid out and accumulated at compound interest, and the entire fund thus accumulated is to belong to the daughters and the younger sons of that son. I am of opinion that such a provision is a provision for each grand-

as a portion, and that the word "son" is most correctly applicable to the subject. This provision is, therefore, in view of the case a provision for portions. The only other question is, whether the provision "any child or children" in the said section is to be construed as including a child or existing children, or may, according to a true interpretation, mean any children which may afterwards come into existence. I am of opinion that it is a proper, if not a necessary, interpretation of the clause, to say that it is not confined to a child or children existing at the date of the settlement, but that it extends to children that may come afterwards into existence. I am of opinion, therefore, that this provision is taken out of the question, and that it stands upon the footing that it would have been but for the said act, and that, consequently, the trust is valid and that the accumulation of the income of the consols now in the names of trustees cannot at present be stopped. I think that it was a reasonable question, whether parties may have their costs out of the fund.

JCE, V.C. } CRACKENTHORP v.
c. 13. } JOUNING.

Administration Suits—Parties—Legatee.

Where a pecuniary legacy is given to a person in such terms as to leave the construction of the will in this respect doubtful, it is regular to make the legatee a party to the administration of the estate of the testator.

Ms Fearn, by her will, bequeathed to M. 3 per cent. consols, part of the standing in her name, for the Village of Manfield in Yorkshire; and appointed the vicar of the parish and the owners of three adjoining parishes trustees for the same; and gave "the sum of the same stock to the Village of Long Marton, Kirkby Shore, E. Sowerby, and Milbourne," in the county of Lancashire, and appointed the rectors of the parishes the trustees thereof. A bill was filed for the administration

of the estate of the testatrix; and one of the questions in the suit was, whether the last-mentioned schools were entitled to the sum of 1,000*l.* 3 per cent. consols each, or to that sum to be divided between them. The rectors of the four last-mentioned parishes were made parties to the suit.

Mr. Malins and Mr. Bagshawe, for the plaintiffs, stated the point as to the legacy or legacies to the four schools.

KNIGHT BRUCE, V.C. said that the rectors had been improperly made parties. All questions as to legacies were provided for in the common administration decree, and ought to be first determined in the Master's office. He thought that the bill ought to be dismissed against them. As, however, the rectors were parties, he would, if it was wished, dispose of the question then.

Mr. Bates, for the rectors, said that he did not wish the question to be then decided.

KNIGHT BRUCE, V.C. said that, on looking again at the bequest, he observed that the legacies were specific, and therefore properly subject to special inquiries, which did not form a part of the common order. He thought therefore that, strictly speaking, the rectors had a right to remain parties if they chose to do so. He then inquired of *Mr. Bates* if he wished them to be retained.

Mr. Bates declined.

A decree was then taken by which the rectors were dismissed, with a reservation of their costs, and special inquiries as to the legacies and the common inquiries were directed.

L.C.
1849.
Feb. 16;
Mar. 16, 17, 23, 28;
April 19. } STEWART v. FORBES.

Practice—Decree by Consent—Waiver of Issue—Rehearing.

On the hearing, the Court expressed an opinion that the case was one which was

proper for an issue, but at the request and with the consent of all parties undertook to decide the cause :—Held, that the parties had, by such consent, precluded themselves on appeal from asking for an issue, or a review of the decree of the Court below, if the question raised was one which, according to the course of the Court, ought, in the first instance, to have been sent to a jury ; but the Court permitted the appellant to shew if he could, that the case was so clear upon the proceedings that the Court might decide it without directing an issue.

This was a suit by the plaintiff, as a partner in the house of Forbes & Co. of Bombay, and it prayed a declaration that he and the defendant, Sir Charles Forbes, were entitled in equal shares to certain sums standing to particular accounts in the books of the partnership ; and that, so far as might be necessary for the purposes therein mentioned, accounts might be taken of the partnership transactions between the plaintiff and the defendant. No articles of partnership were executed between the parties ; but it was insisted upon by the plaintiff, that, in the absence of any stipulation to the contrary, it must be presumed that the partners were interested in the joint concern in equal shares. By the entries in the books of the partnership, the correspondence of the house, and other evidence, it appeared that Sir Charles Forbes for a long series of years had asserted and exercised, with the acquiescence of the plaintiff, an absolute controul and disposition over the funds placed to these particular accounts, in which the plaintiff claimed by his bill to participate equally.

On the hearing, before the Vice Chancellor of England, his Honour expressed an opinion that the case was one in which it was proper to direct an issue to be tried at law ; but at the request of both parties he undertook to decide the question of fact without the intervention of a jury ; and finally pronounced a decision, dismissing the bill with costs. The decree was in this form : " The parties having consented that the matters in question in this cause shall be decided by the Court without directing an issue, this Court doth order that the plaintiff's bill do stand dismissed out of this Court, with costs."

The plaintiff then presented his petition of appeal to the Lord Chancellor.

Mr. J. Parker, Mr. Roll and Mr. A. Smith, for the appellant.

Mr. Bethell, Mr. A. J. Lewis and Mr. Schomberg, for the respondent.

On the part of the respondent a preliminary objection was taken, that the decree of the Court below, being a decree by consent, could not be the subject of appeal ; and that such was the rule at common law—*Shortridge v. Young* (1) ; neither could the question, whether the opinion expressed by the Vice Chancellor, that this was a proper case for an issue, was right or wrong, be tried on this appeal, as no such opinion was embodied in the decree ; and that the attempt to have the case reheard after a party had consented to a particular mode of deciding it, was a species of fraud upon the defendant.

For the appellant, it was contended, that the consent had been given on the ground of the decision of the Vice Chancellor that it was a proper case for an issue ; and that the Court would so far hear the appellant as to shew that this case was one which did not, according to the practice of the Court, require the intervention of a jury.

The LORD CHANCELLOR.—It is quite clear that the parties, having asked the Court below to decide the question itself, cannot now come here and ask me to grant an issue. They have by their consent elected the Vice Chancellor as their arbitrator ; and no Court of appeal can interfere with his decision. The parties may not have had that consequence in view when they entered into that consent. But, suppose the case to be one which is purely matter of equity, and not a case for a jury. The question then is, what have the parties consented to ? They have consented to the Vice Chancellor disposing of the case without an issue. I think it is going too far to say that they have thereby precluded themselves from shewing that it is not a case for an issue. I think they are not precluded by that consent from asking the opinion of the Court upon a matter, which is not interfered with by the consent given on the original hearing. I think the appellant here ought to be allowed to shew me that the case is one which the Vice Chancellor, ac-

(1) 12 Mee. & W. 5 ; s. c. 13 Law J. Rep. (N.S.) Exch. 30.

cording to the course of the Court, might have decided without directing an issue.

The appeal was then proceeded with for the purpose intimated by the Lord Chancellor.

April 19.—The LORD CHANCELLOR.—The question in this case being, in what shares the plaintiff and the defendant were interested in the partnership, it is obvious, that, when the case was originally heard before the Vice Chancellor, it might have appeared so clear, either for or against the plaintiff, as to enable the Court to dispose of the case upon the evidence produced, or so far doubtful, as to have made it the duty of the Court, according to its practice, to direct an issue. The Vice Chancellor, however, at the request of both parties, took upon himself the duty of deciding the question of fact; which, from the form of his decree, he must have been of opinion was proper for the decision of a court of law. In a case of legitimacy, *Morris v. Davies*, Lord Lyndhurst adopted a similar course; and on appeal, the House of Lords (2) considered itself bound to decide upon the case so entertained by the Court of Chancery, though not according to the usual course of its jurisdiction. I did not, therefore, feel myself at liberty to refuse to hear the cause, though the party had concluded himself by consent from asking for, or me from granting, an investigation of the claim before a jury, which is the only proper tribunal for that purpose, if the matter were one of doubt. Besides which, I thought the plaintiff ought to be permitted to shew, that what he claims is so free from doubt as to entitle him to a decree without the intervention of a jury; in which case, the consent, if applicable, would not prejudice his claim. If it were necessary in this case to consider, whether parties, by their consent or other acts, could upon a rehearing or appeal call upon the Court to decide matters which in the usual course are referred to another tribunal, I should probably not assume that duty, except so far as the House of Lords should inform me that I ought to do so. But this could only be in cases which are so far doubtful that the Judge of a court of equity finds that he cannot come

to a satisfactory conclusion upon the evidence before him. That question does not arise in the present case, because I think the plaintiff has failed in making out his case; and, if no such consent had been given, I should at once have dismissed his bill, as a case in which I found no difficulty in coming to a satisfactory conclusion, without the assistance of a jury.

His Lordship then went through the facts of the case, observing that the case of *Peacock v. Peacock* (3) did not apply; as there was conclusive evidence from the books of the partnership, and the dealings and correspondence of the partners, to rebut the legal presumption that the business was carried on upon the terms of an equal partnership; for that it appeared that Sir C. Forbes had, for a series of years, asserted and exercised an absolute right to deal with and dispose of the particular funds in question in such way as he thought fit; and that the plaintiff had always acquiesced in such course of dealing. His Lordship therefore affirmed the decree of the Vice Chancellor, and dismissed the appeal, with costs.

L.C. }
1849. } RAINCOCK v. YOUNG.
April 20. }

Injunction—Practice as to dissolving the Common Injunction after Answer sufficient.

The proper mode of proceeding to dissolve the common injunction is by orders nisi and absolute. The circumstance that the time has expired for taking exceptions to the answer will not entitle the defendant to proceed by special application.

On the 25th of January 1847, a bill of revivor and supplement was filed, and on the 9th of February 1847 the common injunction was obtained, restraining the defendant from issuing execution in an action brought by him against the plaintiff upon a bond. In the summer of 1847 the action was tried, and a verdict was found for the defendant for 900*l*. On the 14th of February 1849, the time for excepting to the answer having then expired, the defendant moved specially before the Vice Chancellor of England, that the plaintiff might

(2) 5 CL. & F. 163.

(3) 16 Ves. 49.

within seven days after service of the order to be made, pay into court the amount recovered in the action at law, or that the injunction might be dissolved. His Honour refused the application, on the ground that, according to the practice, the order *nisi* should have been first obtained.

The motion was now renewed before the Lord Chancellor.

Mr. Stuart and Mr. Haldane, in support of the motion.—Where the answer is to be deemed sufficient, the order *nisi* has no office to perform, because no cause can be shewn, except merits confessed in the answer—*Lacy v. Hornby* (1). In *Bishton v. Birch* (2), Lord Eldon observes, "The general rule is, that the defendant must move to dissolve the injunction, unless cause; but that cannot apply where the parties have so transacted, that, of the ordinary causes against dissolving an injunction, one cannot be used, namely, exceptions to go before the Master." Here the dissolution of the injunction is only asked for if the damages in the action are not paid into court. The following cases were also cited :—

Philips v. Langhorn, 1 Dick. 148.

Sherwood v. White, 1 Bro. C.C. 452.

Acton v. Markel, 2 Ibid. 14.

Culley v. Hickling, 2 Ibid. 182.

The LORD CHANCELLOR observed that those were cases of special applications before answer, and therefore did not touch the present question.

Mr. J. Parker and Mr. Hardy, contra.—This is a motion to dissolve the common injunction; and there are two preliminary objections :—First, that the defendant ought to have proceeded by order *nisi*, according to the established practice. The answer being sufficient, makes no difference—*Molineux v. Luard* (3). The passages in *Gilb. For. Rom.* 196, *Wyatt's Prac. Reg.* 235, can have no application to the present practice. In *Bishton v. Birch*, the order *nisi* had been obtained; for exceptions were shewn as cause—*Naylor v. Middleton* (4). In *Sharpley v. Perring* (5), the fact of the co-defendant's answer not having come in made the case the subject of special

application. Secondly, publication passed in April 1848, and the cause being ripe for hearing, the Court will not entertain an application to dissolve the injunction in this stage of the cause.—

Burnett v. Mole, 1 Keen, 645; s. c. 6 Law J. Rep. (N.S.) Chanc. 214.

Feistel v. King's College, Cambridge, 10 Beav. 491.

The LORD CHANCELLOR.—The second point is not material, if I am with the plaintiff on the first point. The general practice is, that where the common injunction is obtained, the application to dissolve it must be by order *nisi*. If the plaintiff shew no cause, the injunction is gone; if he shew exceptions as cause, and the Master report against the exceptions, the injunction is also gone; or he may elect to shew cause upon the merits, and the injunction then depends upon the decision of the Court. But the proposition here made is, that, after the time has elapsed, within which the plaintiff has a right to quarrel with the sufficiency of the answer, this rule of practice does not apply; and that there may be a special motion to dissolve. If that had been the practice, I should not have thought fit to alter it, though, in my own opinion, the other mode is obviously the most convenient. But the case of *Bishton v. Birch*, when examined, will be found to have no application; for the reasoning of Lord Eldon in the judgment clearly supposes that there had been an order *nisi*; and though the observations attributed by the report to Lord Eldon, and which were relied on by Mr. Stuart, seem inconsistent, and it is not very easy to find out what he intended to express, yet that case must go for nothing to establish the practice now contended for, because in that case there clearly had been an order *nisi*. In all the various branches of this court, a uniform practice has been observed of proceeding by orders *nisi* and absolute, consistently with what I have always considered as the established practice; and I cannot alter that upon some loose expressions attributed to Lord Eldon in a case where the circumstances did not raise the point. The motion, therefore, must be refused, with costs.

(1) 2 Ves. & B. 291.

(2) Ibid. 43.

(3) 2 Dick. 684.

(4) 2 Madd. 131.

(5) 8 Sim. 600.

M.R. }
Dec. 13. } LOMAX v. LOMAX.

Will—Construction—Mortgage, Expression of Intention to pay off supported from context—Personal Estate not exonerated—Annuities—Devised Estate—Primary Charge—Personal Estate exonerated.

E. L., by his will, directed his executors to pay out of specific parts of his personal estate all his funeral expenses and just debts, except a mortgage debt thereafter otherwise provided for. He then devised to his daughter H. for life, with remainder to her first and other sons in tail, his estate called N; to his daughter F. his estate called P. for life, with remainder to her first and other sons in tail; and to his daughter L. S. for life, with remainder to her first and other sons in tail, his estate called T, and some other small estates. In a subsequent part of his will he recited that his estate called T. was subject to a mortgage for 6,000l., a great part of which he was intending forthwith to pay off, and he directed that, should there remain any balance at his death, it should be raised by a sale of timber on the T. estate and other lands devised to L. S. The testator also gave several annuities; the gift to the first annuitant being of 10l. a year for life, or 5l. and his tenement at the lodge rent free; and he charged them on the estate called N. The testator did not pay off any part of the mortgage of 6,000l., and died leaving his three daughters his sole next-of-kin and co-heiresses at law:—Held, in the absence of any disposition, or any apparent intention to exonerate the personal estate, that it ought to be applied to pay off the mortgage on the estate called T, and if insufficient, that the descended estate must be applied, and that any balance must be raised out of the timber.

Held also, that the annuities were charged on the estate called N, in exoneration of the personal estate.

Edmund Lomax, by his will, dated the 24th of September 1846, directed his executors, as soon as conveniently might be after his decease, to pay out of the monies which might then be in the hands of his bankers, so far as the same might extend,

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and by sale of agricultural stock and produce, all his funeral expenses and just debts, except a mortgage debt thereafter otherwise provided for; and he gave and devised to his eldest daughter, Hester, the wife of John Fraser, for her life, with remainder to the first and other sons successively in tail male of them the said John and Hester Fraser, his mansion-house called Netley, with the farm and other buildings, gardens, and mill of the same name, in the parish of Shiere, and all other his lands, tenements, and hereditaments in the parish of Shiere, or in the parish of Abinger, excepting such of his lands, tenements, and hereditaments as were thereafter otherwise specifically devised and disposed of, with remainder, in case of failure of issue male of the said John and Hester Fraser, to his second daughter Frances, the wife of the Hon. Peter Campbell Scarlett, for her life, and at her decease to Lawrence Campbell Scarlett, their son, for his life, and to the issue of the said Lawrence Campbell Scarlett, in tail male, with remainder, on the failure of such issue, to the second and other sons of them the said Peter Campbell Scarlett and Frances Scarlett, in tail male, with remainder, in case of failure of issue male of the said Frances Scarlett, to the first and other daughters successively of the said John and Hester Fraser, in tail male, with remainder, on failure of such issue, to his third daughter, Laura Susanna Lomax, for her life, and to her first and other sons, lawfully begotten, successively in tail male. And he gave and devised to his daughter Frances Scarlett, his mansion and buildings adjoining, called Parkhurst, in the parish of Abinger, for her life, with remainder to her first and other sons in tail male successively, with remainder to her first and other daughters her surviving, successively in tail, with remainder, in case of the failure of issue of the said Frances Scarlett, to his daughter Laura Susanna Lomax for her life, with remainder to her first and other sons successively in tail male, on condition of each and every such son, so claiming, taking and bearing the surname and arms of Lomax. And he gave and devised to his daughter Laura Susanna Lomax for her life, with remainder

T

to her first and other sons successively in tail male, with remainder to her first and other daughters successively in tail, his mansion and premises called Tanhurst, in the parish of Wotton, and also the farms and lands called Birketts and High Ashurst, on condition that the male descendant of the said Laura Susanna, claiming under that devise, should assume and bear the surname of Lomax. He also gave and devised to his said daughter Laura Susanna, and to her first and other sons successively, on the aforesaid condition, the rent-charge of 300*l.* per annum, due and payable to him out of the Childwick Bury estate, and other lands, tenements, and hereditaments in Hertfordshire, with remainder, in case of failure of issue male of the said Laura, unto his daughter Frances Scarlett, in tail male, with remainder on failure of such issue to his grandson Edmund Lomax Fraser for his life, and to his first and other sons successively in tail male. And he gave and devised his estates at Meonstoke, and elsewhere, in Hants, to his daughter Laura Susanna, with remainder, on her dying without issue, to his daughter Frances Scarlett in tail male. The testator also devised to his daughter Laura Susanna his farms of Shoes and Bullcross, and the small one adjoining, which he had lately bought, under such limitations and provisions as the estate of Tanhurst aforesaid. The testator then made several specific devises of small portions of his real estate. He also made several specific bequests of his personal estate, and after giving some small pecuniary legacies, he bequeathed to James Parsons, in consideration of his long service to his father, 10*l.* a-year, or 5*l.* and his tenement at the lodge rent free for his life, and to Mary Fletcher for her long and diligent service 15*l.* a-year for her life. Also to Mary Ann Thornton for her faithful and trustworthy service 15*l.* a-year for her life. He bequeathed to Rosalind, the wife of Edwards the carpenter, daughter of his father's old bailiff, Purse, in compassion for her loss of sight, 5*l.* a-year for her life, and to James Pernger, his late carter, who was injured by a fall from his waggon, 5*l.* a-year for his life; and he thereby charged the said estate at Netley, bequeathed to his daughter, Mrs. Fraser, with the payment of the

said annuities. The testator then recited that he was indebted to the trustees under his marriage settlement in the sum of 6,000*l.* secured to them by mortgage on the said estate at Tanhurst, a great part of which he was then intending and proceeding forthwith to pay off; and he directed that should there remain any balance due from him thereon at the time of his death, his executors and trustees should raise such balance by sale of ash and oak timber on the said farms of Shoes and Bullcross, and such parts of the Tanhurst and other lands thereinbefore devised to his daughter Laura Susanna Lomax as were not within sight of, or within a furlong of, the Tanhurst mansion, and he appointed his sister Laura Augusta Susanna Lomax and his son-in-law John Fraser his executors.

The testator died on the 24th of February 1847, without having paid off any portion of the mortgage of 6,000*l.*, and this suit was instituted by Laura Susanna Lomax, an infant, by her next friend, for the administration of the estate of the testator.

On the 22nd of January 1848, a reference was directed to the Master, who, by his report, dated the 17th of April 1848, found that the testator was twice married, and that Hester Fraser and Frances Scarlett were daughters of the first marriage, and that Laura Susanna was the only child of the second marriage, and that they were his sole next-of-kin and co-heiresses-at-law.

On the 21st of November 1848 a further reference was directed to the Master, who, by his report, dated the 12th of July 1849, found that the 6,000*l.* was due to the trustees of the settlement made upon the marriage of the testator with his first wife, and that it was charged upon the Tanhurst estate and was still due, with an arrear of interest, and that it was the proper debt of the testator. That the testator at the time of his death was seised of a freehold house at Bankside, which did not pass by his will. That oak and ash timber upon the Tanhurst and other small estates, devised to Laura Susanna Lomax could be cut down only to the value of 1,000*l.* 7*s.* 6*d.*, without damage to the estate. That High Ashurst, Shoes, and Bullcross, and Steadman's farm were devised to Laura Susanna Lomax, and were not included in the mortgage.

It also appeared that the general personal estate of the testator was nearly sufficient to pay off the 6,000*l*.

Mr. Turner and Mr. Bayley, for the plaintiff.—The questions for consideration are, whether there was any intention, on the part of the testator, to exonerate his general personal estate from the payment of the mortgage, and if so, whether it was to be applied in exoneration of the timber? Whether the descended estate was to be applied in payment of the mortgage, and whether the annuities are to be paid out of the personal estate, or are a charge upon the Netley estate? The plaintiff is entitled to have the mortgaged estate exonerated from the debt, unless a contrary intention is shewn. The testator contemplated that but little of the 6,000*l*. debt would exist at his death. He evidently intended that the debt should be paid out of his general personal estate; there is no apparent intention to exonerate it, unless it could be said that he did so by charging the balance on the timber, but then the residue of the personal estate is left wholly undisposed of, and if there is an absence of intention to exonerate the personal estate it cannot be implied—*M' Cleland v. Shaw* (1), *Barnewell v. Lord Cawdor* (2), *Boote v. Blundell* (3), *Lord Inchiquin v. French* (4), *Gray v. Minnethorpe* (5). The general personal estate is not chargeable with the annuities, they are charged on the Netley estate; and the intention of the testator is apparent, considering that one of the annuitants has an option of taking an annuity of 10*l*. a-year, or 5*l*. and the lodge of the Netley estate rent free—*Lamphier v. Despard* (6).

Mr. Prendergast, for Mr. and Mrs. Fraser and their children.—The Tanhurst estate was devised, charged with the mortgage in exoneration of the personal estate. The annuities also are not charged on the Netley estate in exoneration of the personal estate. The personal estate is the primary fund for the payment of debts, but every part of the will must receive a construction; the mere expression of an intention to pay

off a mortgage was a recognition of the liability of the estate to pay the mortgage. It therefore required express words to discharge it—*Evans v. Cockeram* (7). The personal estate also is the primary fund for payment of legacies and annuities—*Roberts v. Roberts* (8). These annuities were not dependent upon the charge; if they were, and the testator had not died seised of the Netley estate, they would have failed, which never could have been contemplated by the testator; the charge upon the Netley estate, therefore, is only subsidiary to the personal estate, that being the primary fund to pay the annuities—*Wastell v. Leslie* (9).

Mr. Roupell and Mr. Giffard, for Mr. and Mrs. Scarlett.—The personal estate is exonerated from the payment of the mortgage of 6,000*l*., and the annuities are a charge upon the Netley estate—*Jennings v. Looks* (10), *Lawson v. Hudson* (11), and *Lutkins v. Leigh* (12).

Mr. Ellison for the executors.

Mr. Turner, in reply, cited *Webb v. Jones* (13).

THE MASTER OF THE ROLLS.—It appears to me that, although there is some difficulty in construing this will, there are materials enough to be found in it to come to a proper conclusion. The testator, having three daughters, made several provisions for them, which are mentioned in this will. It is not necessary for the present purpose to go much into detail, and no great part of the will is necessary to be considered. The first thing the testator does is to direct the payment of his funeral expenses and just debts out of certain portions of his personal estate—the just debts having an exception added, that is, an exception of a mortgage debt on his estate called Tanhurst, “hereinafter otherwise provided for.” I think it is to be collected from this, that the testator had an intention of providing for the payment of that mortgage debt in some other way. In a

(1) 2 Sch. & Lef. 538.

(2) 3 Madd. 453.

(3) 19 Ves. 521; s. c. 1 Mer. 193, 222.

(4) 1 Amb. 37; s. c. 1 Cox, 1.

(5) 3 Ves. 103.

(6) 2 Dru. & War. 59.

(7) 1 Coll. 428.

(8) 13 Sim. 336.

(9) 13 Law J. Rep. (N.S.) Chanc. 205.

(10) 2 P. Wms. 276.

(11) 1 Bro. C.C. 58.

(12) Cas. temp. Talb. 53.

(13) 1 Cox, 245; s. c. 2 Bro. C.C. 60.

subsequent part of his will, he states his intention of proceeding to pay off a great part of that mortgage debt, "great part of which I am intending to forthwith pay off," for which mentioned intention of paying off part of the mortgage debt nothing is done. Nothing is proved by any act of the testator what his intention was, and any intention merely thus expressed, without any act following upon it to cast some light upon that intention, is not usually of any considerable weight, because that kind of expression in a testator's will, without any act following upon it, is generally as uncertain as anything can be; but in this case the expression is used under circumstances which give it rather more weight than otherwise it would be entitled to, for it is with reference to that intention that he proceeds to provide for any balance that may remain. Now that balance cannot mean anything but what remains after paying off part of the mortgage. I am of opinion that the word "balance" there means what remains after payment of some debt; and I think it can only apply to the payment of the mortgage; that it can only apply to an intention to pay something. He desired the balance to be paid out of the oak and ash timber described. But the testator did nothing; and the question here is, did he mean the whole to be paid out of this, or only a part? If he meant a part, we know nothing at all of how much he meant to pay off. All that is left in entire uncertainty, but it is directed that the whole of it is to be paid. The whole of it—in what way? The personal estate was not given at all. It is very true that the residue is subject to all legal demands, but from that we cannot draw any conclusion as to what the testator's intention was. If the testator had expressed in any way an intention to dispose of the personal estate, there would not be much difficulty; but I am of opinion that he could not intend it to be applied except for the exoneration of the Tanhurst estate. I think it is a matter of importance, and worthy of consideration, that he has not made any disposition whatever of the personal estate; the consequence of which is, in my opinion, that it ought to be applied in a legal administration of the testator's estate; what is that but the payment of

debts, such as a mortgage charged upon some portion of the real estate? I cannot collect from the will a trace of any intention on the part of the testator of exonerating the personal estate from the payment of that debt; and upon the whole, therefore, I think the first part of the argument is in favour of the plaintiff, upon the principle that the mortgage debt ought to be paid out of the personal estate as far as it will extend; and if that is insufficient, then it must be paid out of the descended estate. This will satisfy that portion of the question, as there is nearly enough personal estate to pay the mortgage; if there is not, sufficient must be taken out of the timber.

There is more doubt upon the other point, but my opinion is in favour of the plaintiff. Several legacies are given as annuities, and they are made payable out of the real estate. If this was merely a general gift of annuities, that charge would not have exonerated the personal estate, but the first annuity is so given that it may be a devise of a portion of the Netley estate, and that appears sufficient to warrant a conclusion that all the annuities are charged upon the Netley estate.

M. R.	}	ROBERTSON v. SKELTON.
1849.		
May 7, 23, 24;		
Nov. 6;		
Dec. 10.		
1850.		
Jan. 31.		

Vendor and Purchaser — Accidents to Buildings — Liability to make good before Sale completed — Risk — Contract — Purchase Money — Interest, from what Time payable.

In July 1846 two houses were purchased under a decree of this Court, and, pending a reference to the Master upon the title, the back walls fell down, and damaged the adjoining premises. Upon an application to this Court by the vendor (which was dismissed with costs against the purchaser, who repudiated the application, on the ground that he had no interest), a reference was made to the Master, who certified that various sums, amounting to 51l. 10s., should be expended

to remove the rubbish and reinstate the adjoining premises, and repair the houses to render them habitable. By another order the work was directed to be done, and the expenses, and also a fee of 2l. 2s. to the district surveyor, and 1l. 1s. to the solicitor of the owner of the adjoining premises, together with the costs of that and a former application, were directed to be paid by the receiver, without prejudice to any question by whom or out of what fund they should ultimately be borne. On the 8th of March 1849 the Master certified that a good title was made; and, upon a petition, the vendor asked that the purchaser might pay his purchase-money, with interest from the time when the purchase ought to have been completed, and that he might pay the sums expended in repairs, fees and costs, amounting together to 172l. 6s. 10d., and be let into possession, and that he might pay the costs of a prior motion and of this petition:—*Held*, that the estate belonged to the purchaser from the date of the order confirming the Master's report nisi: that possession belonged to the vendor till the payment of the purchase-money, subject to his accounting for the rents received; that the vendor ought to be paid all expenses subsequently incurred; that losses happening pending the contract fell on the purchaser; that any immediate obligation requiring an expenditure of money fell upon the purchaser, who was liable for the monies expended for repairs and fees; that the estate, and not the purchaser, was liable for the costs of the trustee, in whom the legal estate was vested; that the purchaser must pay his purchase-money into court, with interest; that the purchaser was entitled to further inquiry respecting the expenditure; that, if satisfied with the inquiry made, the sums paid for repairs, &c. must be deducted out of the rents, without costs on either side,—but if a further reference was required, the costs were reserved.

Held, also, that the vendor was not entitled to interest from the time mentioned in the conditions of sale; but only from the confirmation of the Master's report of a good title.

This was a suit on behalf of the unsatisfied creditors of John Skelton, who was seised of two houses, numbered 4 and 5,

in Wellclose Square, and also of the reversion of a sum of 500l. secured by a mortgage upon lands in the parish of Tickhill, in the county of York, and made payable upon the decease of Fanny Metcalfe.

On the 24th of July 1846, in pursuance of several orders made in the cause, the property was put up for sale by public auction, in two lots; the reversion in the sum of 500l. forming lot 1, and the freehold houses in Wellclose Square forming lot 2. Both lots were purchased by Henry Higinbotham, at 640l. for lot 1, and 300l. for lot 2; and upon the application of the vendor, on the 20th of April 1847, the order nisi, allowing Henry Higinbotham to be the purchaser, was confirmed absolute—*Robertson v. Skelton* (1).

The third condition of sale provided "that the purchaser of each lot should, at his own expense, obtain the Master's report of the purchase, and the usual orders for confirming the same, and also the order to pay in his purchase-money; but if he should neglect or omit to take the Master's report of his purchase, or to get the same confirmed, according to the practice of the court, on or before the 8th day of August 1846, the vendor should be at liberty to obtain and confirm such report at the expense of such purchaser."

The fourth condition provided "that the purchaser of each lot should, on or before the 12th day of November 1846, pay his purchase-money into the Bank of England, in the name and with the privity of the Accountant General of the Court of Chancery in trust in this cause: as to lot 2, to an account to be entitled 'The account of the testator's real estates,' and thereupon should be entitled to his conveyance, and the purchaser of lot 2 should be let into possession, or into the receipt of the rents and profits, as from the 29th day of September 1846, up to which time the vendor would clear all outgoing; but in the event of either purchase not being completed, from any cause whatever, and the purchase-money not paid before the 12th day of November 1846, the purchaser should pay interest on his purchase-money at the rate of 5l. per cent. per annum, from the 12th day of November until the same should be paid."

(1) 10 Beav. 197.

On the 12th day of June 1847, upon a motion of the plaintiff asking that the purchaser should pay his purchase-money into court, it was, upon the application of the purchaser, ordered that it should be referred to the Master to inquire whether a good title could be made to the premises respectively comprised in lots 1 and 2, according to the conditions of sale.

Pending the reference, a portion of the houses in Wellclose Square fell down upon the premises No. 3, belonging to Mrs. Hutchinson, and damaged her greenhouse; and she threatened to bring an action for damages.

On the 27th of July 1847 the plaintiff by petition asked for a reference to the Master to inquire whether it would be for the benefit of the estate to remove the bricks and rubbish from the premises adjoining, and to put the premises into repair, and to make good the damage caused by the accident, and to what amount, and to inquire by whom or out of what fund the expenses should be borne.

The purchaser was served with a copy of the petition, but at the hearing he objected to the service, on the ground that he had no interest, and it was dismissed against him with costs; but an order was made, dated the 2nd of August 1847, referring it to the Master, and he, by his report dated the 7th of September 1847, found, upon a survey made by Mr. E. H. Browne, that it would be for the benefit of the estate of the testator that the bricks and rubbish should be forthwith removed from the premises of Mrs. Hutchinson, and that the damage done to the greenhouse should be reinstated at an expense not exceeding the sum of 13*l.*, and that the building in the rear of the back building of No. 4, Wellclose Square should also be forthwith repaired and reinstated at an expense of 6*l.* 10*s.* That the back building at the rear of No. 5, Wellclose Square, should be shored up at an expense not exceeding the sum of 7*l.*, and that such repairs as were absolutely necessary to be done to the houses No. 4 and 5, Wellclose Square, to render them habitable, and retain the present tenants, should be forthwith done, and that such removal and repairs should be done at a cost not exceeding in the whole the sum of 51*l.* 10*s.*, and be paid by

the receiver out of the sum of 342*l.* 9*s.* 4*d.*, the balance then in his hands (which arose from rents received by him before he was appointed receiver). The Master also thought that notice of his report should be given to the purchaser. The plaintiff paid Mr. Browne the sum of 7*l.* 7*s.* for the costs of his survey.

On the 15th of September 1847 the Master's report of the 7th of September 1847 was confirmed, and the work specified in the report was ordered to be done; and it was also ordered that payment of the expenses, and also of the further sums of 1*l.* 1*s.* to the solicitor of Mrs. Hutchinson, and 2*l.* 2*s.* to J. B. Redman, the district surveyor, should be paid by the receiver, and allowed him on passing his accounts; but all such payments were to be made without prejudice to any question by whom, or out of what funds, the same ought to be ultimately borne; and the Taxing Master was to tax the costs of all parties, except Henry Higinbotham, their costs of and incident to the former application, and the order of the 2nd of August 1847, and of the proceedings and report consequent thereon, and of the application for the now stating order, and consequent thereon, and such costs were to be paid by the receiver, who was also to pay to the plaintiff the costs which, under the order of the 2nd of August 1847, should be paid to Henry Higinbotham, together with the costs of giving such notice of the Master's report to the purchaser, and that he should also pay to the plaintiff the sum of 7*l.* 7*s.* paid to Mr. Browne.

The several costs were taxed:—those of H. Higinbotham at the sum of 8*l.* 2*s.* 7*d.*, those of the plaintiff at 81*l.* 16*s.* 4*d.*, and those of J. H. Skelton, the trustee, at 28*l.* 10*s.* 6*d.*, amounting in the whole to the sum of 118*l.* 9*s.* 5*d.*, which was paid by the receiver. The receiver also paid the several sums amounting to 51*l.* 10*s.* for the work done upon the premises, the 1*l.* 1*s.* to the solicitor of Mrs. Hutchinson, 2*l.* 2*s.* to J. B. Redman, and the 7*l.* 7*s.* paid to Mr. Browne, amounting in the whole to 62*l.*, which, with the 118*l.* 9*s.* 5*d.* for costs, made the full sum of 180*l.* 9*s.* 5*d.*, and left a balance of 161*l.* 19*s.* 11*d.* in the hands of the receiver.

The Master by his report, which was

confirmed by an order dated the 8th of March 1849, certified that a good title was made to the premises comprised in the said lots numbered 1 and 2, according to the conditions of sale; but that the purchaser had not taken any steps to procure an order to pay the purchase-money into court with interest.

The rents received since the 29th of September 1846, after deducting the expense of insurance, amounted to the sum of 95*l.* 7*s.* 11*d.* up to the 25th of December 1848. And it was now asked by this petition that H. Higinbotham might pay into court, before the 16th of May 1849, in trust in this cause, the several sums of 300*l.* and 640*l.*, with interest after the rate of 5*l.* per cent. per annum, from the 12th of November 1846, pursuant to the conditions of sale. And that the said H. Higinbotham might also pay into court, in trust in this cause, the several sums of 81*l.* 16*s.* 4*d.*, 28*l.* 10*s.* 6*d.*, 51*l.* 10*s.*, 1*l.* 1*s.*, 2*l.* 2*s.* and 7*l.* 7*s.*, making together 172*l.* 6*s.* 10*d.*; and that the receiver might be directed to pay to the said H. Higinbotham, out of the said sum of 161*l.* 19*s.* 11*d.* remaining in his hands, the sum of 95*l.* 7*s.* 11*d.*, the amount of the rents and profits of the said premises received by him from the 29th day of September 1846, and to let the said H. Higinbotham into possession of the premises in Wellclose Square; and that the said H. Higinbotham might pay all parties their costs of the motion of the 12th of June 1847, and also the costs of this petition, and incident thereto.

Mr. Martindale, for the petitioner.—Upon the confirmation of the Master's report allowing the purchase, the purchaser became the owner of the estate in equity; it completed the purchase, and the consideration must be paid, though the estate itself should be destroyed. On the other hand, the vendor became a trustee for the purchaser; who is entitled, not only to the rents, but to any benefit which may accrue to the estate after the contract (2). In *Paine v. Meller* (3), where houses were burned down after the contract, the loss was held to fall upon the purchaser, though,

after the contract, an insurance upon the houses had been allowed to expire without any notice being given to the purchaser. The Court always recognized the confirmation of the Master's report as the completion of the contract. *Vesey v. Elwood* (4), *Ex parte Minor* (5), *Twigg v. Fifield* (6), *Anson v. Towgood* (7), *Harford v. Purrier* (8), *Garrick v. Earl Camden* (9), and *Accland v. Gaisford* (10). If a watercourse was sold which, subsequent to the contract, became dangerous, and an action was brought against the vendor as the legal owner, he would have a good remedy against the purchaser, and the damages must fall upon the equitable owner; the costs properly incurred must be paid by the legal owner; but the equitable owner will have to repay them. The costs also which had been incurred must be governed by the conditions of sale.

Mr. Steere, contra.—The purchaser does not object to the common order for payment of the purchase-money into court, but no precedent exists for making a purchaser pay what this petition asks. The cases cited only relate to accidents by fire. In this case the vendor has been guilty of waste: by his negligence he has allowed the houses to fall down. There is a great difference between waste and accident. It is necessary to look at the contract before this question can be determined. This is an application for unliquidated damages, but there is no record upon which to ground any such claim. If the plaintiff considers he is injured, he may bring his action for the injury, but the purchaser cannot enter into this question. Had the purchaser taken possession, it would have been a waiver of all objections to the title. When the purchaser was previously before the Court, he was asked to take possession, and repair the damage, but he refused; and the plaintiff now asks that the purchaser may pay the costs of that petition and the reference; but through the negligence of the vendor, the purchaser cannot now have what he bought. In

(4) 3 Dru. & War. 74; s.c. 2 Con. & Law. 47.

(5) 11 Ves. 559.

(6) 13 Ibid. 517.

(7) 1 J. & W. 637.

(8) 1 Madd. 532.

(9) 2 Cox, 231.

(10) 2 Madd. 28.

(2) 1 Sug. Ven. & Pur. 468, 10th ed.; 71, 74, 331, 11th edit.

(3) 6 Ves. 349.

Mackrell v. Hunt (11), a purchaser under a decree, who had taken objections to title, was considered as owner only from the time he paid his purchase-money, and not from the confirmation of the report, which alone declared him to be the best bidder. A party who expends money upon the estate of another is without a remedy to recover his outlay. If the vendor has any claim, it ought to have been brought before the Court by bill. Petitions have been in some cases tolerated to avoid expense, but not in cases like the present. The purchaser also cannot be asked to pay costs which the vendor has incurred in proceedings with which the purchaser has no interest. These expenses now amount to a total of 172*l.* 6*s.* 10*d.* In *Camden v. Benson* (12), it was said that a purchaser under the Court was entitled to the costs of a reference as to the title reported good by the Master; but from a note to *Flower v. Harlopp* (13), there appeared to be an inaccuracy in the report, it being merely held that the purchaser was not liable to pay the costs of the reference. In *Nelson v. Bridges* (14), a purchaser was held to have a remedy by supplemental bill, after a decree for specific performance, for damages occasioned to the property *pendente lite*; but it merely directed an action to ascertain the damages. In *Denton v. Stewart* (15), a reference was directed to the Master to ascertain the damages which the plaintiff had sustained by the non-performance of an agreement, but it was contrary to the usual practice of this court, *Todd v. Gee* (16), unless perhaps some question arose between the parties to a suit. Had the purchase-money been paid into court, all questions which could have arisen upon the contract would have been determined; but as this case at present stands, if the plaintiff will claim unliquidated damages, there must be a record in court upon which to ground that claim. It has taken three years to make out this title; and in the mean time the vendor, who has himself to blame, complains that the

property has put him to expense. In *Paine v. Meller* (17) no decision was ever come to. The purchaser proposed to waive objections to the title upon terms, and a reference was directed to the Master to inquire whether the proposal was accepted or acquiesced in by the purchaser. No decree similar to the order now asked has ever been made. It is entirely a new proposition for a vendor to ask for damages from a purchaser who cannot be made responsible until he takes possession of the premises. Cases of fire arise from accident, but allowing a house to fall down is a case of gross negligence and waste. It is impossible to suppose the case of a purchaser making a similar application, but a vendor has been held accountable for the diminution of value in an estate where the completion of a purchase has been delayed from difficulties in the title.

Foster v. Deacon, 3 Madd. 394.

Ferguson v. Tadman, 1 Sim. 530.

Minchin v. Nance, 4 Beav. 332.

Mr. Martindale, in reply.—An action for the damage to the adjoining premises could alone have been brought against the devisee in trust. It could not have been brought against the equitable owner. In absolute and unconditional contracts, the risk is the risk of the purchaser, because that which is the subject of the risk is in equity considered as the property of the purchaser; where, therefore, a binding contract is subsisting, the completion of which in its exact terms becomes impossible, through accident, without any default of the vendor, a court of equity will endeavour to afford relief, independent of form, though it cannot alter the substance of the agreement or impose upon either party obligations totally different from those which by agreement they had contracted—*Counter v. Macpherson* (18). The Master by his report has found that certain work was requisite, and for the benefit of the estate. There is no substantial ground for complaining of what has been done. Had the vendor not collected the rents, or had he sold the policy of assurance upon the premises, or omitted to pay the premiums, would he not

(11) 2 Madd. 34, n.

(12) 1 Keen, 671.

(13) 8 Beav. 199; s. c. 12 Law J. Rep. (N.S.) Chanc. 39.

(14) 2 Beav. 239.

(15) 1 Cox, 258; s. c. 17 Ves. 276, n.

(16) 17 Ves. 273.

(17) 6 Ves. 349.

(18) 5 Moo. Priv. C. Cas. 83.

have been liable, and might not the purchaser have applied to this Court by petition for relief? The whole of the facts are before the Court in the suit, and this Court will not put a party to the suit to the cost of filing a bill against a purchaser, whose only right is under the decree in the cause.

Nov. 6.—**THE MASTER OF THE ROLLS.**—No complaint was made of the state of the buildings at the time of the purchase, neither was there any delay in carrying out the contract on the part of the vendor. Had the purchaser chosen, he might have taken possession of the houses in November 1846. The estate belonged to the purchaser from the date of the order confirming the Master's report *nisi*, but the right to the possession belongs to the vendor until the purchase-money is paid; but he is liable to account for the rents which he receives, and he ought to be repaid all expenses; losses also happening by accident and fire in the mean time fall upon the purchaser. If any immediate obligation must be satisfied, which cannot be done without an expenditure of money, it falls within the same principle, and the purchaser must bear the expense. The vendor, upon the falling of the house, obtained a reference to the Master to inquire what sums ought to be expended in upholding the building: the purchaser then declined to be a party to the inquiry. It was found that 51*l.* 10*s.* was a proper sum to be expended, and that sum, together with 2*l.* 2*s.* paid to the district surveyor, and 1*l.* 1*s.* paid to the solicitor of the party whose premises had been damaged, must be paid by the purchaser. The remaining part of the money which the vendor seeks to have reimbursed consists of costs. The purchaser was allowed the costs of his appearance upon the petition for the reference to the Master relating to the accident. The other costs have been properly incurred for the protection of the trustees, but the purchaser is not liable for them, and they must be paid out of the testator's estate; the purchaser, also, is not bound by the Master's report. I must therefore order the purchaser to pay his purchase-money into court with interest, and the vendor must account for the rents received, and if the purchaser desires any further inquiry respecting the expenditure,

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he is entitled to it, but if he is satisfied with what has been done, the sums expended must be deducted out of the rents which have arisen from the estate, to which he is entitled. If the purchaser is satisfied with what has been done I shall give no costs on either side, but if any further reference is required, I shall reserve the costs.

Dec. 10.—A question was afterwards raised upon the minutes of the order, as to the time from which the purchaser ought to pay interest upon the purchase-money.

Mr. Martindale, for the plaintiff.—By the conditions of sale interest is to be paid upon the purchase-money, though the purchase shall not be completed "from any cause whatever" at the time specified. The vendor has taken every step to carry the contract into effect, and there is nothing to shew that he has been guilty of any default; he is, therefore, under the conditions of sale, entitled to interest upon the purchase-money from the 12th of November 1846—*Greenwood v. Churchill* (19).

Mr. Steere, for the purchaser.—The vendor has taken three years to make out his title; and he cannot require the purchaser to pay interest. It is, in fact, to ask the purchaser to pay damages for the vendor's default. The abstract was to be delivered in fourteen days, but it was not till three years after that the Master's report was obtained. It cannot, therefore, be supposed that the non-completion of the purchase, "from any cause whatever," is to apply to cases arising from the vendor's own acts; and it is difficult to understand why a purchaser is to be bound, when he did not contemplate that any delay would arise from the non-performance by the vendor of an agreement, which he stipulated he would perform. The vendor was in no condition to ask for the payment of the purchase-money before the 8th of March 1849, and no interest ought to be paid until the principal was asked for. In *De Visme v. De Visme* (20), it has been held

(19) 8 Beav. 413; s. c. 14 Law J. Rep. (N.S.) Chanc. 143.

(20) 1 Hall & Twells, 408; s. c. 1 Mac. & Gor. 336; 18 Law J. Rep. (N.S.) Chanc. 159; *ante*, p. 52.

by the Lord Chancellor, reversing the decision of Vice Chancellor Wigram, that the time for payment of interest, at the rate prescribed by the conditions, does not begin to run until a complete title is shewn.

Jan. 31, 1850.—THE MASTER OF THE ROLLS.—There was a sale on the 24th of July 1846, and by the conditions of sale it was stipulated that the purchaser should obtain the Master's report declaring him the purchaser at his own expense, and, if he neglected so to do, the vendor was then to be at liberty to obtain the report at the purchaser's expense, and the purchaser was to pay his purchase-money into court on the 12th of November 1846, and if he did not do so, "from any cause whatever," then he was to pay interest thereon. The purchaser did not obtain the Master's report, and the vendor did so. A motion was then made by the vendor for payment of the purchase-money into court, whereupon the defendant asked for and obtained a reference to the Master as to the title; and on the 8th of March 1849, the Master made his report, stating that a good title had been shewn. The plaintiff then moved for payment of the purchase-money into court, which was ordered, but nothing was said as to the time from which the interest thereon should be paid. The plaintiff then asked for interest upon the purchase-money from the 12th of November 1846, but this was opposed by the purchaser because the vendor could not shew a good title before the 8th of March last; and because the delay in payment of the purchase-money was occasioned by the vendor himself, and, on the principle of *De Visme v. De Visme*, the purchaser insisted he was not liable to pay interest from the 12th of November 1846, notwithstanding the condition of sale. I am of opinion that the plaintiff is not entitled to have interest on the purchase-money from the 12th of November 1846, but only from the confirmation of the Master's report certifying that a good title was shewn. Another objection has been made with respect to lot 1, but as regards it, the order must be for interest from the time a good title was shewn.

K. BRUCE, V.C. }
Nov. 6. } RILEY v. GARNETT.

Devise—Construction—Estate of Trustees—Vesting.

A testator devised real estate unto and to the use of three trustees, their heirs and assigns, upon trust, to pay the rents to a married woman, for her separate use for her life, and, after her death, in trust for all her children, who, being sons, should attain twenty-one, or being daughters, should attain that age or marry, and their heirs and assigns for ever:—Held, that the trustees took the whole legal fee, and that all the children of the tenant for life living at her death, minors and not minors, took vested interests, in equity, in the estate, subject, as to the share of any minor, to be divested in the event of his or her dying under twenty-one.

John Garnett, by his will dated the 3rd of December 1832, as to his ten messuages in Bennett's Place, Bethnal Green, gave those numbered 1 to 5, inclusive, in the manner therein mentioned, for the benefit of Martha Soilleux, a daughter of the deceased wife of the testator, her husband and children. The will then proceeded as follows:—"And I give and devise all those five messuages or tenements respectively numbered 6, 7, 8, 9, 10, together with so much of the other moiety or half part of the said garden as is freehold, unto and to the use of John Garnett, James Soilleux, and James Sill, their heirs and assigns, upon trust to pay the rents and profits thereof, as the same shall from time to time arise and be received, into the proper hands of Mary Ann Elisha, the wife of Peter Elisha, another daughter of my said wife deceased, during the term of her natural life, or otherwise to permit or suffer her to receive the same to and for her own sole and separate use and benefit; and from and after the decease of the said Mary Ann Elisha, in trust for all the children of the said Mary Ann Elisha, by the said Peter Elisha begotten or to be begotten, who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or be married, share and share alike as tenants in common, and not as joint tenants, and their heirs and assigns

for ever. And as to the said slip or parcel of leasehold garden ground, I give and bequeath the same unto the said John Garnett, James Soilleux, and James Sill, their executors, administrators, and assigns, in trust for such person or persons as for the time being shall be entitled to the last-mentioned messuages or tenements, and the rents and profits thereof. Provided always, and it is my will that it shall be lawful for, and I hereby empower, the said James Soilleux, John Garnett, and James Sill, and the survivor of them, his executors and administrators, as to the freehold hereditaments and premises hereby devised or bequeathed to, or in trust for, each of my said daughters-in-law, and her child or children as aforesaid, during the life of such daughter-in-law, and, after her decease, in case she shall have any child or children living at her decease under the age of twenty-one years, then during the minority or respective minorities of such child or children of such daughter-in-law, of the proper authority of the person or persons hereby empowered as aforesaid, from time to time to demise or lease, according to the nature of the said property, in possession, and not in reversion, all or any part or parts of the said freehold and leasehold hereditaments and premises hereby devised or bequeathed to or in trust for such daughter-in-law and her children as aforesaid, for any term or terms of years," &c.

The testator died in August 1840, leaving Mrs. Elisha him surviving. Mrs. Elisha died in October 1840, leaving six children; the eldest of whom, Mary Ann, had alone attained the age of twenty-one years, the other five being minors. The youngest of these children was born after the death of the testator.

Mary Ann Elisha, the daughter, married Mr. Riley. The bill, which was filed by Mr. and Mrs. Riley against the trustees and the other children of Mrs. Elisha, prayed for a declaration that, in the events which had happened, Mrs. Riley had become alone entitled to the property.

Mr. Malins and Mr. Simpson, for the plaintiffs, contended that, according to the proper construction of the will, the estate given to the trustees was confined merely to the life of Mrs. Elisha; and that her children only who had attained twenty-

one in the life of their mother were to be entitled to the property. They cited—

Curtis v. Price, 12 Ves. 89.

Mogg v. Mogg, 1 Mer. 654.

Bull v. Pritchard, 1 Russ. 213.

Festing v. Allen, 12 Mee. & W. 279;

s. c. 13 Law J. Rep. (N.S.) Exch. 74.

Mr. Chandless, Mr. Stinton, Mr. Elmsley, and Mr. Speed, for the other parties.

Knight Bruce, V.C.—My opinion (as it is wished that I should pronounce one in this case) is this—that, although there are both principle and authority for saying that a devise to and for the use of a trustee in fee, without restrictive words, may, by the context, be restricted to an estate *pour autre vie*, an interpretation frequently adopted, I think that such rule of interpretation cannot be applied here. It is, in my opinion, excluded by the context, rather than introduced by it. I am of opinion that, upon the true construction of the will, the legal fee in the freehold estate vested in the trustees.

I am also of opinion that, according to the true construction of the will, upon the authorities preceding, and including *Doe d. Roake v. Nowell* (1), there is an immediate equitable devise to all the children, minors and not minors, living at the death of the tenant for life, subject to the contingency of their estates being divested upon their dying in their minority.

His Honour then added, that he might, if desired, send a case for the opinion of a court of law.

Mr. Malins declined having a case sent to law.

A decree was taken containing a declaration that all the children had vested interests in the estate, and were entitled to the rents, at once,—subject, however, to the shares of those who were under twenty-one being divested, in the event of their dying under that age. The costs of all parties to be paid out of the rents then in the hands of the trustees.

(1) 1 M. & S. 327; s. c. 5 Dow, 202.

M.R. }
 Nov. 17; } SMITH v. LORD SOMERS.
 Dec. 3. }

Power—Execution by Will, Proof of, in a Court of Equity—Probate insufficient.

The execution of a power appointing a sum of stock standing in the name of the Accountant General, must be verified by affidavit, notwithstanding the probate of the will in the Ecclesiastical Court.

Under the will of Elizabeth Cocks, dated the 30th of April 1807, her niece, Maria Cocks, became entitled to a legacy, which the trustees were directed to invest, and pay the dividends to her for life, for her separate use; and in case there should be no child or children of the said Maria Cocks living at her decease, the trustees were to pay the principal to such person as she should, by a deed or will, attested by two witnesses, appoint, and in default of appointment to her executors or administrators.

The will was proved by James Cocks, in June 1808, and this suit having been instituted, the legacy was laid out in the name of the Accountant General, in the purchase of 2,003*l.* 0*s.* 7*d.* consols, in trust in this cause "the account of Maria Cocks."

In 1811 Maria Cocks intermarried with Admiral Sir William Hargood, but no settlement or agreement for a settlement was made affecting the 2,003*l.* 0*s.* 7*d.*; and by an order, dated the 27th of November 1811, the dividends were directed to be paid to her for life, with liberty for any person entitled to apply at her decease.

In 1839 Admiral Sir W. Hargood died, and Maria Hargood, by her will dated the 27th of July 1849, directed that the sum of 2,003*l.* 0*s.* 7*d.* consols, and all accumulations thereof, and dividends arising therefrom, should be paid to R. T. Cocks, for his own absolute use and benefit, to whom she bequeathed the same accordingly.

This will was executed in the presence of two witnesses, and attested.

Maria Hargood died on the 2nd of September 1849, without leaving any child or children living at her decease, there never having been any issue of her marriage with Sir W. Hargood, and having received all the dividends upon the sum of 2,003*l.* 0*s.* 7*d.* up to the time of her decease.

On the 16th of October 1849 her will was proved in the Prerogative Court, and this petition was now presented by R. T. Cocks, asking that the Accountant General might be directed to transfer the fund to him.

Mr. G. L. Russell appeared in support of the petition.

The MASTER OF THE ROLLS.—Notwithstanding the probate of the will, this Court requires proof of the execution of the power. It is, I think, requisite that there should be an affidavit verifying the due execution of the will.

Dec. 3.—Mr. G. L. Russell.—Two affidavits have been made, the one by the witnesses verifying the will of the testatrix, and her signature, and their attestation of the same in her presence, and in the presence of each other, and that she was the person mentioned in the petition. The other proves the marriage, the death of Sir W. Hargood, and the death of Maria Hargood without leaving any child or children living at her decease, and that there never was any issue of the marriage with Sir W. Hargood. It also identifies the testatrix as the person named in the petition.

The MASTER OF THE ROLLS. — They appear sufficient; you may take the order.

[See *Ward v. Ward*, 11 Beav. 377.]

V.C. }
 Dec. 6. } LONG v. STORIE.

Staying Proceedings—Costs—Two Suits for the same Object.

A bill was filed before Vice Chancellor Knight Bruce by a mortgagee of an advowson for foreclosure of his mortgage, and for further relief. The defendants filed their answers; and after an order had been made in the cause, in which costs had been given against the plaintiff, the plaintiff died, and his executors, instead of reviving the original suit, filed a new bill in this court, praying the same relief as to the foreclosure of the mortgage, but omitting the further relief included in the original bill. The defendants

moved that all further proceedings in the second suit should be stayed until the costs of the first suit, and the order made therein, should have been paid. Motion granted.

This was a motion, on behalf of five of the defendants, that all further proceedings in the cause might be stayed as against them, until the plaintiffs should have paid to them their costs of a certain cause instituted in the Court of Chancery by John Long, deceased, against the said defendants and other persons, including the costs of an order made in the said cause, dated the 19th of April 1849.

It appeared that the said John Long, who was a mortgagee of the advowson of Camberwell, had in his lifetime filed a bill marked for the Vice Chancellor Knight Bruce for a foreclosure in respect of his mortgage, and also seeking equitable relief against some subsequent incumbrancers, including the above defendants, in respect of certain sequestrations which had been issued against the incumbent of the living upon judgments entered up as collateral securities for the several mortgage debts. The defendants making the motion filed their answers in the original suit; and John Long, the plaintiff therein, shortly afterwards died, and appointed the plaintiffs in the present suit his executors, who, after proving his will, instead of reviving the original suit, filed a new bill marked for the Vice Chancellor of England, and praying the same relief as was prayed in the original suit, so far as related to the foreclosure of the equity of redemption in the mortgaged premises, but omitting the case raised in the former cause as to the sequestrations.

Mr. Rolt and Mr. Tripp, in support of the motion, urged the oppression and injustice which were imposed on the defendants by the course pursued by the plaintiffs; that the principle of all Courts was that *nemo debet bis vexari*; and that the sole object of the plaintiffs in filing a new bill was to avoid payment of the costs of an order which had been obtained against the plaintiff in the original bill; that the circumstance of the plaintiffs abandoning a part of the relief sought in that bill was not material; and they cited *Spires v.*

Sewell (1) and *Altree v. Hordern* (2) as cases in point.

Mr. Bethell and Mr. Follett contended that *Altree v. Hordern* was a solitary case, and that the Master of the Rolls made that decision before the Orders of May 1845 (3); and that the defendants ought to have applied to the Vice Chancellor Knight Bruce in the abated suit that the plaintiffs, as executors of Long, might be ordered to revive that suit within a limited time, or that the bill be dismissed.

The VICE CHANCELLOR said, it appeared to him that the order asked by the defendants was consistent with justice, and he should follow the case before the Master of the Rolls; an order was accordingly made in the terms of the notice of the motion.

K. BRUCE, V.C. }
Dec. 3, 6. } FAREBROTHER v. BEALE.

Interpleader—Demurrer.

A bill was filed by A, stating that B. was a mortgagee, with a power of sale, of an estate belonging to D, and mortgagee of some chattels also belonging to D; that C. had also an interest in the said chattels; that B, with the assent and concurrence of C, had instructed A. to sell all the property; that A. had sold it, and had the money in his hands; and that A. had afterwards received a notice that D. had been made a bankrupt, and that he was required by the assignees not to part with the money, and praying that B, C, and the assignees of D. might interplead together. To this bill B. demurred. The demurrer was overruled.

The bill in this case stated that the defendant, Mr. Beale, was mortgagee, with a power of sale, of a villa and an estate at Fulham, called "the Willow Bank," belonging to Mr. Delafield, and was also mortgagee of certain furniture and chattels in the villa, also belonging to Mr. Delafield; and that Mr. Walker, another of

(1) 5 Sim. 193.

(2) 5 Beav. 623; s. c. 12 Law J. Rep. (N.S.) Chanc. 76.

(3) 63rd Order, Ord. Can. 307; 14 Law J. Rep. (N.S.) Chanc. 290.

the defendants, claimed to be interested in the furniture and chattels, and that Mr. Beale, *with the assent and concurrence* of Mr. Walker, instructed the plaintiffs, Messrs. Farebrother, Clarke & Lye, who were auctioneers, to put up all the property for sale, and that the sale commenced on the 2nd of July 1849, and was proceeded with for several days after, and that the plaintiffs had in their hands the sum of 8,232*l.*, the proceeds of the sale.

The bill then stated, that on the 17th of July the plaintiffs received notice that a fiat had issued against Mr. Delafield, and that they were required by the assignees, the other defendants, not to part with the purchase-money.

The bill also stated, that there was a dispute between Mr. Beale and Mr. Walker as to the application of the purchase-monies, and that Mr. Beale had brought an action against the plaintiffs to recover such monies.

The prayer of the bill was, that the defendants might interplead together, and that their rights to the money might be determined by the Court.

To this bill Mr. Beale demurred; the grounds of demurrer being want of equity and multifariousness.

Mr. Russell and *Mr. C. Barber*, for the demurrer, contended that the demurrer ought to be allowed; first, on the ground that the plaintiffs were merely the agents of Mr. Beale, and could not dispute his title—*Crawshay v. Thornton* (1); and, secondly, on the ground of multifariousness, as Mr. Beale was interested both in the real estate and the chattels, whereas Mr. Walker claimed an interest in the chattels only, and as the case against the assignees was not one of interpleader—*Nickolson v. Knowles* (2).

Mr. Swanston and *Mr. Hislop Clarke*, for the plaintiffs, contended that the bill was properly framed as a bill of interpleader; and cited—

Pearson v. Cardon, 2 Russ. & M. 606.

Suart v. Welch, 4 Myl. & Cr. 305.

Jew v. Wood, Cr. & Ph. 191; s. c.

10 Law J. Rep. (n.s.) Chanc. 262.

(1) 2 Myl. & Cr. 1; s. c. 6 Law J. Rep. (n.s.) Chanc. 179.

(2) 5 Madd. 47.

KNIGHT BRUCE, V.C.—According to my present view of the record a case of interpleader is stated between Mr. Beale and Mr. Walker. That leaves the question open whether a case of interpleader is stated as against the assignees of Delafield, and if not, what is the effect upon Mr. Beale's rights in the suit in the absence of such a statement. My present impression is that, assuming that a case of interpleader is not stated or made out as against the assignees, the bill is not, therefore, rendered multifarious. My impression is that the bill is not multifarious. My present impression also is that, whether a case of interpleader is or is not stated as against the assignees, Mr. Beale is not entitled to demur. But I will read the record again carefully. I may possibly change my opinion, but, unless I mention it again, it must be taken that my opinion remains.

On a subsequent day his Honour said, with reference to the case,—I entertain the same opinion that I before expressed on this case. I have again read over the bill more than once, and, my view remaining unchanged, I must hold that the demurrer cannot be sustained. It is the demurrer of Mr. Beale only; no one else complains now. The demurrer must be overruled; and the costs will take their ordinary course.

K. BRUCE, V.C. } THE ATTORNEY GENERAL
Feb. 12. } v. VINT.

Will—Charitable Use.

*A testatrix gave 1,000*l.* consols to trustees, upon trust to apply the dividends to the providing each poor inmate of the D. Union Workhouse above sixty years with a pint of porter. By the Poor Law Amendment Act the introduction of fermented liquors into a workhouse was forbidden. The trustees submitted to act as the Court should direct. An order was made that the dividends should be paid to the vicar of the parish of D, to be applied by him pursuant to the provisions of the will, so far as the same might be consistent with the Poor Law Amendment Act.*

Grace Say, by a codicil to her will, dated

the 21st of May 1841, made the following bequest:—"I give and bequeath to my trustees aforesaid, 1,000*l.* 3*l.* per cent. consols, upon trust to pay and apply the dividends to the providing each of the poor inmates of the Dartford Union Workhouse, who shall be above the age of sixty years, with one pint of porter, more or less, according to the number."

The testatrix appointed Mr. Vint and three other persons her executors and trustees, who proved her will.

An information was filed, by the Attorney General, at the relation of Mr. Campbell, one of the guardians of the poor of the Dartford Union, against the executors and trustees of the will of Miss Say, and prayed that the legacy might either be ordered to be transferred into, or vested in, the names of the defendants, or be otherwise properly secured under the direction of the Court, upon the trusts declared by the codicil, for the benefit of the poor inmates of the said Dartford Union Workhouse for the time being, above the age of sixty years; and that, if necessary, some scheme might be settled for the application of the past and future dividends for the benefit of such poor inmates.

The defendants, by their answer, stated that some doubts existed as to the legality of the bequest, as by the 92nd and 93rd sections of the Poor Law Amendment Act, 4 & 5 Will. 4. c. 76, the introduction of fermented or spirituous liquors into any workhouse was forbidden, and it was made an offence to introduce them unless under the directions of the surgeon or the guardians, or in conformity with the rules of the Poor Law Commissioners; and that the rules and directions issued by the Poor Law Commissioners contained no authority to introduce fermented liquors, except under medical orders. They also stated that they and such of the persons interested in the residuary estate of the testatrix as were competent to consent, wished that the intention of the testatrix might be carried into execution; but that some of the *cestuis que trust* entitled under the will were unable to consent; and they submitted to act as the Court should direct.

Mr. Russell and Mr. Hallett, for the information.

Mr. R. Palmer and Mr. G. L. Russell,

for the defendants, declined to argue the question, whether the bequest was illegal, and stated that they would submit to any order as to the legacy which the Court might make, so that they should be free from any liability.

Knight Bruce, V.C. said, that care should be taken that the law should be obeyed, and that no fermented liquors should be introduced except in conformity with the Poor Law Amendment Act. Should fermented liquors be prohibited, he thought that the fund might be applied in some manner so as to give the poor old people in the union tea, sugar, and such like indulgences.

Some discussion took place as to the form of the order to be made. The form ultimately agreed on was as follows:—The costs of all parties prior to the hearing to be paid by the defendants out of the estate of the testatrix, and the costs of the Attorney General of the hearing to be paid out of the fund: the residue of the fund to be paid into court and invested, and the income to be paid to the vicar for the time being of the parish of Dartford, to be by him applied pursuant to the provisions of the will, so far as the same might be consistent with the Poor Law Amendment Act; the vicar to give an account once a year, on the first general vestry held after Good Friday, to the vestry, of the manner in which the income had been applied. Liberty to apply to the Court in case any difference should arise as to the manner of such application.

K. BRUCE, V.C. } GEE v. THE TOWN COUN-
Feb. 12. } CIL OF MANCHESTER.

Will—Construction—Devise in fee qualified by death with issue and without issue.

A testator devised real estate to A, his heirs, executors and administrators; but directed that, if A. should die without issue, the estate should go in the manner therein mentioned; and that, if A. should die leaving issue, such issue should take the estate. A. survived the testator:—Held, that the words "in the lifetime of the testator" were not to be supplied after the words "issue" and

"issue," in the latter part of the will; and, consequently, that *A.* did not take the fee simple.

In November 1822, the commissioners for lighting and regulating the town of Manchester agreed, under the powers of a local act, to purchase a piece of land in Manchester, from the then owners of it, for 2,200*l.*; with a stipulation that, until the purchase should be completed, a certain annual rent should be paid. The commissioners entered into possession of the property soon after the date of the agreement, and the rent was regularly paid. All the powers and liabilities of the Commissioners were afterwards transferred to the town council of Manchester.

At the date of the will of William Gee, he was entitled to a moiety of this property.

William Gee, by his will, dated the 3rd of January 1828, made the following disposition:—"Furthermore, I will and bequeath the whole of my freehold, leasehold, and personal property to be divided equally amongst my dear and affectionate children, in manner and form following, that is to say, I will and bequeath to my eldest son, Adam Gee, one-seventh share of my property, to his heirs, executors and administrators; and another seventh share I give and bequeath to my daughter Sophia Gee, to her heirs, executors and administrators; and another seventh share I give to my daughter Mary Gee, to her heirs, executors and administrators; and another seventh share I give and bequeath to my son Joseph Gee, to his heirs, executors and administrators; and another seventh share I give and bequeath to my daughter Ann Gee, to her heirs, executors and administrators; and another seventh share I give and bequeath to my daughter Martha Gee, to her heirs, executors and administrators; and another seventh share I give and bequeath to my daughter Elizabeth Gee, to her heirs, executors and administrators; and in case any of my sons and daughters *die without issue*, that their share returns to my sons and daughters, equally amongst them; and in case any of my sons and daughters *die, and leaving issue*, that they take their deceased parent's share, share and share alike."

The testator died on the 11th of July

1828, leaving all the children named in his will him surviving. Sophia afterwards married Mr. Watson, and died leaving Edward Watson, an infant, her heir-at-law. Joseph Gee also died, having devised all his property to his brother Adam. Some of the children of the testator had children at the time of filing the bill, but these grandchildren of the testator were not made parties to the suit.

The bill, which was filed by the surviving children of the testator and Mr. Watson against the town council of Manchester, and Edward Watson, the infant, prayed for a specific performance of the agreement of 1822, and the payment of the purchase-money.

The only question in the cause was, whether, under the will of William Gee, the plaintiffs and infant defendant were entitled absolutely to the purchase-money.

Mr. Wigram and *Mr. Beales*, for the plaintiffs.—In the events which have happened, the seven children of William Gee named in his will having survived him, the latter part of the will became inoperative, and these children took absolute interests in the property at the testator's death, and consequently the plaintiffs and infant defendant are entitled to a moiety of the purchase-money. It is an established rule of construction that, where property is given to *A.* absolutely, with a gift over "in case of his death," the words "in case of his death" are referred to *A.*'s dying in the lifetime of the testator. Here, there is a gift to each child absolutely, with a gift over, both if he dies *with issue* and *without issue*. Now, a person must die either with issue or without issue, and the expressions, therefore, "if any die without issue" and "if any die leaving issue" are resolved into the simple expression "in case of the death of any," and the same rule ought to govern both cases. The words, then, "if any die with or without issue" ought to be referred to the lifetime of the testator. If it be held otherwise, then, in no way could a child of the testator take more than a life interest, and it is in the highest degree improbable that a testator should write the words *his heirs, executors and administrators*—words giving the absolute and entire interest in the property—if he had in his view merely the

giving a life interest. If he had meant a life interest, he would most probably have said a life interest. These views have been adopted in the case of *Clayton v. Lowe* (1), which follows *Doe v. Sparrow* (2), a case very similar to it. These are the only cases directly in point, but there are other cases which have a bearing on the subject. In *Galland v. Leonard* (3), *Da Costa v. Keir* (4), and *Home v. Pillans* (5), the fund was given to A. for life, or a limited period, with remainder to B. in fee, with a gift over, in case of the death of B. without leaving children; and it was held that the words "in case of the death of B." were to be referred to the lifetime of the tenant for life; or, in other words, the expression "in the lifetime of the tenant for life" was supplied. They also referred to *Clarke v. Lubbock* (6).

Mr. Russell, for the town council of Manchester.

Mr. Chandless and Mr. Twells, for Edward Watson, the infant.

KNIGHT BRUCE, V.C.—In this will, the words in the former part, which import a gift of the absolute interest to the children, are cut down by a gift over, both in the event of their leaving children and their not leaving children. The question is this: am I warranted, under these circumstances, in introducing the words "in my lifetime" in the latter part of the will? I think that I am not. At the same time, I will readily send a case for the opinion of a court of law.

Mr. Chandless referred his Honour to some observations of Mr. Jarman, on the case of *Clayton v. Lowe*, which concluded with—"It would be unsafe to rely on this case as a deliberate adjudication in support of so doubtful a principle"—2 *Jarman on Wills*, 691.

KNIGHT BRUCE, V.C. said, that he must repeat, that he could not insert the words required without the authority of a court of law; but that he wished that he could

(1) 5 B. & Ald. 636.

(2) 13 East, 359.

(3) 1 Swanst. 161.

(4) 3 Russ. 360; a. c. 5 Law J. Rep. Chanc. 161.

(5) 2 Myl. & K. 15; a. c. 4 Law J. Rep. (N. S.) Chanc. 2.

(6) 1 You. & C. C. C. 492.

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give the fund to the plaintiffs, and that, to enable him to do so, they would take the opinion of a court of law.

The following order was made:—

The plaintiffs undertaking to make all the children of the plaintiffs parties to the suit, and to bring on the cause for hearing, and to obtain a decree for the specific performance of the contract, the town council to pay the principal and one-seventh of the interest since 1846 into court, and to pay the residue of the interest to the plaintiffs, unless the plaintiffs should take the case to a court of common law.

M.R. { RANKEN V. THE EAST AND WEST
Dec. 19. { INDIA DOCKS AND BIRMING-
HAM JUNCTION RAILWAY
COMPANY.

Railway Company—Lands Clauses Consolidation Act—Mortgagee—Time limited for Payment of Mortgage Money—Compensation—Right of Entry on Lands—Injunction.

A railway company having notice that certain lands required for the purposes of the railway were mortgaged, and that the mortgage money could not be paid off until March 1851, paid the purchase-money into court, upon a valuation, to the credit of the mortgagor, and entered upon the lands without any communication to or negotiation with the mortgagees:—Held, that the company not having provided for the expenses of reinvestment or for the costs of the mortgagees, or any compensation for the difference of interest, had wrongfully taken possession of the lands, and an injunction was granted to restrain them from prosecuting the works of the railway upon the lands mortgaged.

This was a motion that the defendants, their servants, &c. might be restrained from keeping possession of certain land and premises in Camden Town, or any part thereof, and from further pulling down or demolishing the messuage thereon erected, and from prosecuting the works of the intended railway upon the land and premises, until the value of the rights and interests of the plaintiffs had been ascer-

tained, and payment made or secured to the plaintiffs as required by the company's respective acts of parliament.

The East and West India Docks and Birmingham Junction Railway Company was incorporated by the 9 & 10 Vict. c. cccxcvi, and the Companies Clauses Consolidation Act, 8 Vict. c. 16, the Lands Clauses Consolidation Act, 8 Vict. c. 18, and the Railways Clauses Consolidation Act, 8 Vict. c. 20, were incorporated with it; and the company was empowered to enter upon, take and use such lands as should be necessary for the undertaking.

On the 11th of January 1833 a lease of the premises in question had been granted to Richard Hardy for a term of ninety-six years from the 25th of December 1842, at a ground-rent of 9*l.*, and on the 10th of March 1848 he assigned them to Messrs. Ranken & Inglis, by way of mortgage to secure the repayment of the sum of 700*l.* and interest; and by the mortgage deed it was provided that so long as Mr. Hardy should insure the premises from fire, and pay the interest upon the mortgage money, and also the rent of 9*l.*, and observe the covenants and conditions of the lease, Messrs Ranken & Inglis should not require payment of the mortgage money until the 5th of March 1851, nor commence or institute any proceedings either at law or in equity to enforce the payment thereof, or to sell or obtain possession of the said premises, or to foreclose the equity of redemption thereof. The interest upon the mortgage had been regularly paid by Mr. Hardy.

The company required the premises comprised in the lease to Mr. Hardy for the purposes of their undertaking, and on the 9th of March 1849 Mr. Hardy, in pursuance of a notice from the railway company, delivered in particulars of his claim, which, among other things, stated that the premises were in mortgage to Charles Ranken and Charles Inglis, and he claimed 1,365*l.* for value, and 170*l.* for compensation for injury.

By the Lands Clauses Consolidation Act, 1845, 8 Vict. c. 18. ss. 108, 109, 110, 111, 112, 113, 114, provision is made respecting the rights of mortgagees of lands to be taken by railway companies for the purposes of their several under-

takings, and it was insisted that, upon receiving the claim, it was the duty of the railway company, before taking possession or entering upon the lands in mortgage to the plaintiffs, to have treated with Messrs. Ranken & Inglis for the purchase of their interests, and for the compensation to be made to them in respect thereof; but that they neglected to treat with the plaintiffs, or to make any communication to them respecting the premises, but the company's surveyor sent to the surveyor of Mr. Hardy an agreement, dated the 4th of June 1849, for his signature. It stated that R. Hardy agreed to sell free from all incumbrances, except ground-rent, all his estate and interest in the premises upon the terms that the company should pay to R. Hardy before the 11th of August then next, or at any prior time that they might think fit, the sum of 1,200*l.* for the value of his estate and interest in the hereditaments, and for compensation; and in lieu of all rights, claims and interests which he had or might have under the act of parliament, or otherwise. It then stipulated that Mr. Hardy, at the costs of the company, should make a good marketable title, and also convey the premises by all proper parties to the company, or as they should direct. It also stipulated that possession should be given to the company on payment of the purchase-money, but if the completion of the purchase was delayed, possession was to be given to the company upon depositing the amount of the purchase-money in the banking house of Messrs. Glyn & Co., at the sole risk of the railway company, in the joint names of one of the directors and R. Hardy.

Mr. Hardy's surveyor refused to sign this agreement, and sent it to Mr. Hardy's solicitor, who was also the solicitor of the mortgagees; and he apprised the solicitor of the company that Mr. Hardy was not in a condition to sell the premises free from incumbrances, and that a treaty must be made with the mortgagees, and at the same time gave them notice that any attempt to take possession would be resisted.

The railway company took no notice of this letter, but they sent to Mr. Hardy's solicitor a bond, dated the 17th of November 1849, under the seal of the railway company, and under the hands and seals

of John Scott and Alexander Beattie, as sureties, which recited that the company was desirous of entering upon the lands required to be purchased in pursuance of the act, and that no agreement had been come to between the company and R. Hardy for the purchase of his interest, and that no award had been made, or verdict given, for the purchase-money to be paid by the company to R. Hardy, for his interest, or for compensation for the damage to be sustained by severance or otherwise; and that R. Hardy did not consent to such entry and user of the said lands, and that the company, on the 17th of November 1849, deposited in the Bank of England, in the name and with the privity of the Accountant General of the Court of Chancery, and to his account there "ex parte the East and West India Docks and Birmingham Junction Railway Company, to the credit of R. Hardy," the sum of 1,080*l.*, the same being the value of his interest in the lands and premises, and for compensation for injury or damage, as determined by a practical surveyor, appointed by T. J. Arnold, a metropolitan police magistrate, and that the said East and West India Docks and Birmingham Junction Railway Company, and J. Scott and A. Beattie, who had been approved of by the said T. J. Arnold, as sufficient sureties, had also entered into the above bond. And the bond was conditioned to be void if the company or their successors should pay to R. Hardy, his heirs, executors or administrators, or deposit in the Bank of England, for the benefit of the parties interested in the said lands, under the provisions of the recited act, all such purchase or compensation money as should by the Lands Clauses Consolidation Act, be determined to be payable by the said company in respect of the estate and interest which, under the powers of the said acts, or either of them, or otherwise, the said R. Hardy might be legally entitled or enabled to sell and convey to the said company of and in the said lands so to be entered upon by the said company, together with interest thereon at the rate of 5*l.* per cent. per annum, from the time of entering upon such lands and hereditaments, until such purchase-money or compensation should be paid or deposited.

On the 3rd of December 1849 the company took possession of the premises, without any notice to Messrs. Ranken and Inglis, the mortgagees, and proceeded to pull down the messuage; and upon the 13th of December 1849 this bill was filed against the company and against T. Tyrrell, their solicitor, charging that the railway company had full knowledge that the plaintiffs were the mortgagees long before the date of the bond; that the recitals in the bond were, to a considerable extent, untrue; that T. Tyrrell, as the solicitor of the company, had received various letters, from which it appeared that the plaintiffs were mortgagees; that he communicated them to the directors of the company before the entry upon the land, and that he was a proper party to the suit, and praying for the injunction now sought to be obtained; at the same time offering to join in any proceeding and inquiry to ascertain the amount payable to the mortgagees by the company.

Mr. Turner and Mr. Glasse.—The interest of the mortgagees has been wholly lost sight of by the company. Notwithstanding the 114th section of the Lands Clauses Consolidation Act, nothing has been paid for the expenses of reinvestment, or for costs, neither has any compensation been made for the difference between 5*l.* and 3*l.* per cent. interest. The defendants insisted that there had been acquiescence on the part of the mortgagees in the proceedings, but this bill was filed as soon as possible after possession was taken. The house has been taken down; the injunction, therefore, which is asked for, is, to restrain the company from prosecuting their works.

Mr. Walpole and Mr. Hetherington.—The company is charged with not having made a complete contract, but it was empowered by the 6th and 7th sections of the Lands Clauses Consolidation Act, to purchase lands, even from persons under disability. Before any contract is made, companies have a power to enter on the lands upon paying the purchase-money into court. Companies now deal with persons in possession of the property required, and the course here followed has been, as the affidavits state, according to the usage

of railway companies in similar cases. The 114th section of the same act was only in force until payment or tender of the purchase-money; it had no application to mortgagees, who were not entitled to possession of the lands in consequence of a default of the mortgagor. Neither the 108th nor 114th sections could overrule the 6th and 7th sections. The solicitor of the mortgagor was also the solicitor for the mortgagees; he never undertook to complete the contract for the mortgagor; the company, therefore, was forced to take possession under the 84th and 85th sections of the act, by paying full compensation into court, which is for the satisfaction of all parties interested, who have an interest in the land. Even assuming that the company have made any mistake, they have now complied with the provisions of the act, and the plaintiffs have no right to the injunction asked—*Willey v. the South-Eastern Railway Company* (1).

Mr. Turner, in reply.

THE MASTER OF THE ROLLS.—It would have been a satisfaction to me if the parties could have settled this question, but as they require my opinion, I feel bound to give it. It is clear from the provisions in the mortgage-deed, that as the interest has been hitherto duly paid, the mortgagees have not a right to take possession. The railway company, in their proceedings, knowing of the mortgage, have thought fit, according to the power given to them by the act of parliament, 8 Vict. c. 18. to treat with the mortgagor, and with the party in possession, without any regard at all to the mortgagees; I am not prepared to say that they had not a right to do so, but exercising that right, they must be subject to all the consequences which may arise from their not having done something else, which is requisite to their right to obtain possession, or to deal with this property as their own. They endeavoured to come to an agreement with the mortgagor, and they had a perfect right, as I conceive, to do so; but they were not acting according to that which was for their own interest, if they thought fit to do so, without taking

some care that the mortgagees' interest was also provided for. They had a perfect right to deal with the mortgagor, as they thought fit, they might require the mortgagor to settle anything that might be settled between the mortgagor and mortgagees. They were informed that this was a mortgage, and they neglected together to have any communication with the mortgagees. In consequence of this the mortgagor, it seems, declined to enter into an agreement with the company, or do it so long that they thought fit to proceed independently of them, and they proceed as they say, under 8 Vict. c. 18. and having ascertained in the manner mentioned in the affidavits what was the value of the land, they paid into court to the account of the mortgagees, and to the account of the mortgagor, a sum of money which by the proceedings they conceive they had ascertained to be the value of the land. The mortgagees neglecting their interest altogether neglected to file this bill, and possession having actually been taken, what they now want is that the railway company, who are in possession, should be prevented from dealing with the land in such a manner as to lessen their security. True it is that the mortgagees have not a right to take possession or so long as the interest is paid; but they have a right to the security of the land, and they have a right certainly to have the value of the land protected against the acts of other persons without consultation with them respecting their interest. What does the act of parliament, 8 Vict. c. 18. s. 114, say on this? It says, "over the cases of common mortgages, I take only this particular case, with respect to this: there is a mortgage deed, and it is limited for the payment of the purchase money thereby secured; now that being the case, 'if a mortgagee shall have been required to accept payment of his money, or of part thereof, at a time less than the time so limited,' which has not been, but if he had been so required, 'the promoters of the undertaking shall pay to such mortgagee, in addition to the purchase money, a sum which shall have been so paid, and all such costs and expenses as shall be incurred by such mortgagee in respect of the mortgage, or which shall be incidental to it

(1) 1 Hall & Twells, 56; s. c. 1 Mac. & Gor. 58; 18 Law J. Rep. (N.S.) Chanc. 201.

investment of the sum so paid off, such costs, in case of difference, to be taxed, and payment thereof enforced in the manner herein provided with respect to the costs of conveyances; and if the rate of interest secured by such mortgage be higher than at the time of the same being so paid off can reasonably be expected to be obtained on reinvesting the same, regard being had to the then current rate of interest, such mortgagee shall be entitled to receive from the promoters of the undertaking, in addition to the principal and interest hereinbefore provided for, compensation in respect of the loss to be sustained by him by reason of his mortgage-money being so prematurely paid off, the amount of such compensation to be ascertained, in case of difference, as in other cases of disputed compensation." I do not find that anything of the sort has been done, or attempted. No treaty has been entered into, no offer to pay what shall be expended in reinvestment, no attempt to ascertain what is due for compensation in consequence of the difference between the interest to be received when the reinvestment is made, and the interest which is reserved by the mortgage deed. Then comes the final clause in this section, which says, "And until payment or tender of such compensation as aforesaid, the promoters of the undertaking shall not be entitled as against such mortgagee to possession of the mortgaged lands under the provision hereinbefore contained." I have not read any clause in these acts of parliament of less ambiguous interpretation. Having been forbidden to do this, what has been done? The company has paid into court, in the name of the mortgagor, a sum of money equal to the value of the land, providing nothing for the expense of reinvestment, nothing for any other costs, and nothing for compensation in respect of the difference of interest. I am clearly of opinion that this possession was wrongfully taken; but the question is what I am now to do, and I think I am not doing anything contrary to what this Court has done in such cases if I grant an injunction to prevent the company from dealing with the land as they intend to do for their own purposes. I remember a case before Lord Cottenham, in which a

bill was filed to prevent a bridge being made over a poor man's cottage. It was no sooner known that an application was to be made to the Court, than the company built the bridge over the cottage in the course of the night, and when the motion was made the next morning, they said "You are too late, the bridge is built, and the Court cannot interfere;" but his Lordship said, though I cannot prevent you from building the bridge, as it is built, still I can grant an injunction to prevent your using it; he did grant the injunction, and the poor man had his compensation. This Court does not adhere so formally to the fact of possession but that it takes care to mould its orders in such a manner that justice may be done.

As I am called upon to decide this most foolish contest, I cannot refuse to compel obedience to an act of parliament which seems perfectly plain. There are means to do justice between the parties, and to talk of this fund being in court, which is just the value of the land, without any amount for the costs of reinvestment and the other costs, it not even standing in the name of the persons who will be entitled to it, is a mockery. I am surprised at the course adopted by the defendants, who in their affidavits say, that the course adopted is according to the usage of railway companies, and that the like has been done by railway companies on other occasions; but to introduce such statements into an affidavit to endeavour to influence the Court in matters especially of this kind is a gratuitous absurdity. The plaintiffs are entitled to an injunction to restrain the company from prosecuting the works of the railway upon the premises in mortgage.

K. BRUCE, V.C. }
Jan. 17. } SMALE v. GRAVES.

Administration of Estate—Executor—Goodwill of a Profession.

A, a surgeon dentist, carrying on his profession at a house held by him as tenant from year to year in the town of H, died, having appointed B, his widow, his executrix, who alone proved the will. Within a few days after A's death, two agreements were entered into between B. and C, a surgeon dentist, in

which *B.* was described as one of the executors of *A.*, the effect of which was that *C.* should give *B.* 500*l.* for the goodwill of the business of *A.*, and the advantage of being introduced to the patients of *A.*, and take *A.*'s house, and purchase his furniture and surgical instruments at a certain price. Evidence was entered into on *B.*'s behalf that the agreement as to the 500*l.* was not entered into by *C.* in the character of executrix, and that it was the intention of the parties that that sum should be paid to her, for her own benefit, as the price of her personal influence with the patients of *A.* and her personal exertions in introducing them to *C.* The Master having found that the whole of the 500*l.* belonged to *B.*,—Held, on exceptions, that the whole or a part of the 500*l.* belonged to the estate of *A.*; and it was referred back to the Master to review his report, with this declaration.

This was a creditors' suit, instituted for the administration of the estate of *H. S. Graves*, against *Mary Graves*, his widow and executrix. The Master, in his report, made in pursuance of the usual decree, had charged *Mrs. Graves* with certain sums, which she admitted to be due from her. Exceptions were taken to the report by the plaintiff, on the ground that the Master had not charged *Mrs. Graves* with the sum of 500*l.*, which the plaintiff insisted ought to have been found due from her, under the following circumstances:—

Mr. Graves carried on the profession of a surgeon-dentist at a leasehold house, occupied by him as tenant from year to year at a rack rent, situated in *Clare Place* in *Halifax*. *Mr. Graves*, by his will, appointed *Mrs. Graves* and *Mr. Newton* his executrix and executor, and died on the 11th of December 1847, and *Mrs. Graves* alone proved the will.

On the 13th of December 1847 the following circular was issued by *Mrs. Graves*:—"The executors of the late *Mr. H. S. Graves*, surgeon dentist, beg to inform his friends and the public, that his widow hopes to be enabled to make satisfactory arrangements for completing the work in hand, and carrying on the business in connexion with some competent member of the profession."

On the 17th of December the same cir-

cular was issued with the following postscript:—"Till the above arrangements can be effected, the executors beg to inform the public that a late friend and assistant of *Mr. Graves* (now resident in *London*) will be here in the early part of next week to attend to the practice."

On the 24th of December the following agreement was executed by *Mrs. Graves* and *Mr. Parsons*:—"Memorandum of an agreement made between *Mary Graves*, of *Halifax*, widow, and one of the executors of *H. S. Graves*, late of *Halifax* aforesaid, surgeon dentist, of the one part, and *J. H. Parsons*, of &c., of the other part. *H. S. Graves* having lately died, and the said *J. H. Parsons* being wishful to begin business at *Halifax*, hereby agrees to give to the said *M. Graves* for the goodwill of the business of her late husband the sum of 100*l.* per annum for the term of five years, which term to commence on the 1st day of January next; and the said annuity of 100*l.* to be paid by half-yearly instalments on the 1st day of January and the 1st day of July in each year during the said term—the first half-yearly payment to be made on the 1st day of July next. The said *J. H. Parsons* further agrees to pay to the said *M. Graves* the sum of 100*l.* for the value of the instruments and stock in trade lately belonging to the said *H. S. Graves*, and also such sum for the value of the furniture in the house of business of the said *H. S. Graves* at *Halifax* as shall be determined by a competent person to be selected by the said *M. Graves* to value the same, the said sum of 100*l.* and the said value of the furniture to be paid on or before the 1st day of February next—the said annuity of 100*l.* to be secured on the property of the said *J. H. Parsons* to which he is entitled under his father's will, the expense of which security to be paid by him. A proper deed or agreement in accordance with these presents to be drawn up at the joint expense of the parties hereto, and executed by them as soon as the same can be prepared."

To this was added a memorandum, signed by *Mrs. Graves*, "Agreed to by me with the understanding that in case of my death before the expiration of five years, the annuity to be payable to my heirs, executors, administrators and assigns."

On the 30th of December another circular was issued by Mrs. Graves, which was as follows:—"Mrs. Graves begs to announce to the inhabitants of Halifax and its neighbourhood that Mr. Parsons is the successor of her late husband. His high testimonials and the advantages necessarily resulting from many years' practice, will, she confidently hopes, prove satisfactory to those who may require his professional aid. Mrs. Graves feels grateful for the patronage so liberally extended to her late husband, and solicits the continuance of it to his successor."

On the 1st of January 1848 a more formal instrument was executed by Mrs. Graves and Mr. Parsons. The commencement and recitals were as follows:—"Articles of agreement made, &c. between M. Graves, of &c., widow, and one of the executors of the last will and testament of H. S. Graves, late of Halifax aforesaid, surgeon dentist, deceased, of the one part, and J. H. Parsons, of &c., surgeon dentist, of the other part. Whereas the said H. S. Graves, who died on or about the 11th day of December last, during his lifetime and up to his death carried on and exercised his profession or business of a surgeon dentist at Halifax, and for that purpose occupied a house situate in Clare Place, in Halifax aforesaid. And whereas the said J. H. Parsons being desirous of commencing business at Halifax aforesaid as a surgeon dentist and of being the successor of the said H. S. Graves, from the advantage that would thereby accrue to him in his business, lately agreed with the said M. Graves to pay to her *for the goodwill* of the said business of the said H. S. Graves, and for the advantage of an introduction to the patients of the said H. S. Graves the sum of 500*l.*, to be paid by half-yearly instalments of 50*l.* each on the days hereinafter mentioned, and which sum, with any interest due in respect thereof, was agreed should be secured on a sufficient mortgage to the satisfaction of the said M. Graves; and that the said J. H. Parsons also agreed with the said M. Graves to take the surgical instruments and stock in trade of the said H. S. Graves, and also certain articles of furniture in his house of business in Clare Place aforesaid, at a valuation, to be paid for within one month

after such valuation, and also would take such house from the 1st day of January inst., for the residue of the term and interest of the said H. S. Graves therein; and that the business in hand at the time of the death of the said H. S. Graves should be completed by the said J. H. Parsons at his own expense, for the sole benefit of the said M. Graves. And whereas the said M. Graves agreed to the said terms, and, in performance of the said agreement on her part, *hath introduced the said J. H. Parsons to the patients* of the said H. S. Graves by circulars and advertisements (approved of by the said J. H. Parsons), and hath otherwise *used her endeavours* to promote the interests of the said J. H. Parsons, and to enable him to succeed in obtaining the business of her said late husband, and hath delivered possession of the said house of business, surgical instruments, stock in trade, and articles of furniture to him. And whereas the said J. H. Parsons, in part performance of the said agreement on his part, hath taken the said surgical instruments, stock in trade, and articles of furniture at a valuation, and such valuation amounts to the sum of 150*l.*; and that the said J. H. Parsons hath given to the said M. Graves his promissory note under his hand, payable one month after date for securing the same." The deed then contained a covenant, on the part of Mr. Parsons, for the payment of the 500*l.* by ten half-yearly instalments. The deed then contained an agreement, on the part of Mr. Parsons, to take the house in Clare Place for the residue of the said term and interest of the said H. S. Graves, or his executors therein, and to pay a due proportion of the accruing rent, and all rent thereafter to become due, and to indemnify Mrs. Graves from all claims and demands, costs, and expenses to be thereafter made "in respect of the said house or the repairs thereof, or the rents or taxes for the same, and also in respect of the said business, or on account of the said J. H. Parsons succeeding to the same, or on account of the said M. Graves recommending the said J. H. Parsons to the patients of the said H. S. Graves, or otherwise in respect of the said business, and also that he would not in any way in the said business make use of the name of the said M.

Graves without her consent." The deed then concluded thus : "And lastly the said J. H. Parsons agrees at his own costs to complete all such business as the said H. S. Graves had in hand at the time of his death, and to pay the full amount received for such business to the said M. Graves for her own use, as soon as the same shall be received ; but he will pay the amount for such business to the said M. Graves, whether the same shall be received by him or not, not later than the 1st day of July next."

This was the case made by the plaintiff for charging Mrs. Graves with the 500*l.*

Mrs. Graves adduced, in answer, the affidavits of a clergyman and a merchant residing at Halifax, and of her legal adviser in the proceedings, to the following effect :—That she was on her husband's death left in destitute circumstances ; that her husband had been much respected, and that her case had excited great commiseration in Halifax ; that there had been a consultation of her friends as to what could be done for her ; that it had been intimated by several of the patients of Mr. Graves that they would be glad to continue their support to Mrs. Graves, if she could make arrangements for her own individual and personal benefit for carrying on the business by means of an assistant or otherwise ; that at first it had been determined that the business should be carried on by her, by means of an assistant, but that it had afterwards been considered that it would be a better course that the business should be taken off her hands in the manner carried out in the agreement with Mr. Parsons, and that the dealings with Mr. Parsons had been conducted solely with a view to the personal and individual benefit of Mrs. Graves, and not with the view of any benefit to the estate of the testator.

Mr. Parsons also made an affidavit, containing the following statements :— " I entered into the agreement under the assurance and belief (and I would not have entered into any such agreement except upon such assurance) that Mrs. Graves, in consideration of the annuity, would and could, from her personal influence with the former patients of the testator, induce such patients to employ me as successor in his business, and on the understanding that she

should continue to reside for a time at, or in the immediate neighbourhood of, Halifax ; with the view of securing to me the full benefit of the agreement, by introducing me to such patients, and by her personal influence with them in that behalf. I say that, from the introductions of Mrs. Graves and from their desire personally to benefit her, many of the patients of the testator have employed and do continue to employ me, as I verily believe, on the understanding that Mrs. Graves had secured to herself personally, and for her own exclusive benefit, some interest or advantage in or from the business so carried on by me since the death of her husband. I say that requiring a house in which to carry on my business, and Mrs. Graves being desirous of giving up that in which her husband resided, I engaged to take it off her hands at the same rent her husband paid, and to relieve her from liability in respect of rents and covenants. I say that, according to my judgment and belief, should the defendant not be allowed to retain the sum of 500*l.* for her own individual benefit, and, in consequence, should withdraw her influence with her late husband's patients, my business may be very seriously damaged, and the principal object I had in view for my own benefit in entering into the agreement (the securing such influence) will be frustrated or altogether defeated, and, in that event, it is my intention to resist the fulfilment of my said agreement with her for payment of the annuity, and thenceforth to withhold payment of the same."

Mr. Russell and *Mr. Randell*, for the exceptions, contended that the 500*l.* paid and to be paid by Mr. Parsons belonged to the testator's estate, and cited *Worral v. Hand* (1), and *Chisum v. Dewes* (2).

Mr. Bacon and *Mr. Toller*, for Mrs. Graves.—There is no such thing as the goodwill of a profession. The case of *Worral v. Hand* related to a public-house, in which it is admitted that there is a goodwill, which is often more valuable than the house itself. There is no reliance placed on the personal skill of the individual that may keep a public-house, and

(1) *Peake's N.P.C.* 74.

(2) 5 *Russ.* 29.

a great deal depends on its locality and situation. This is not so with professions. A reliance is placed on the personal skill of those who exercise professions, and the precise locality in a town where such professions are carried on is immaterial. If a gentleman who has carried on a profession dies, his executors have no influence, which is capable of being valued, of putting any one else in his place. Clients and patients choose for themselves. That the goodwill of a profession is not a thing capable of having a value assigned to it, has been recognized by authority—*Farr v. Pearce* (3), and *Spicer v. James*, reported in *Collyer on Partnership*, p. 104 (4). There is no reason to doubt the substantial accuracy of Mr. Collyer's report, and what was there reported to be said by Sir John Leach is not inconsistent with the decree. In *Lewis v. Langdon* (5), it was decided that the executors of one of two partners had no interest in a goodwill of a business. *Chisum v. Dewes* is no authority, as there the house, with what was called the goodwill, was merely sold for what it would fetch. In this case the 500*l.* proceeds partly from the personal exertions of the defendant, and partly from the commiseration felt for her, and the disposition of the inhabitants of Halifax to befriend her, and no part of it arises from any rights existing in her in the character of executrix. If she had abstained from doing anything with the business and had left Halifax after the death of her husband, her conduct could not have been in any degree impeached, which would have been the case if there had been any goodwill, or any rights in her as executrix in that respect.

KNIGHT BRUCE, V.C.—Whether any complaint could or could not have been made against the defendant if she had done nothing with respect to this business, I

(3) 3 Mad. 78.

(4) In the report of *Spicer v. James*, in Mr. Collyer's book, it was stated that the bill had been dismissed. In the course of the argument the Registrar's book containing the decree in *Spicer v. James* was produced in court, and there did not appear to be contained in it anything relating to the dismissal of the bill against any person.

(5) 7 Sim. 421; *a. c.* 4 Law J. Rep. (N.S.) Chanc. 258.

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need not say. It appears that she has dealt with it. With great deference to the Master I am of opinion that, either the whole or a part of the 500*l.* must be considered as belonging to the estate of the testator. I think that the Master must review his report, with a declaration that something belongs to the estate of the testator. If the Master should allow the defendant something, I shall agree with him. I am unable to accede to the proposition that no part belongs to the testator's estate.

L.C. { *In re* THE CAMBRIDGE AND
1849. { COLCHESTER RAILWAY COM-
Nov. 7. { PANY.
 Ex parte Marsh.

*Company — Winding-up Act, 1848 —
Costs against Official Manager.*

Under an order for winding up the affairs of a company under the Joint-Stock Companies Winding-up Act, 1848, certain costs had been occasioned to alleged contributories, in attending a meeting before the Master, which had become inoperative by the previous default of the official manager:—Held, that neither the Master nor the Court had jurisdiction to order the official manager personally to pay to such contributories the costs of their attendance.

On the 25th of May 1849, an order was made under the Joint-Stock Companies Winding-up Act, 1848 (1), for winding up the affairs of this company, upon the petition of one Freeman. The first meeting before the Master to whom the matter was referred was held on the 1st of June 1849, when the Master directed advertisements to be published of a meeting for the appointment of an official manager, and that the petitioner should, previously to such meeting, prepare and leave with the Master a list of the contributories to the said company, and that a copy of such advertisement should be sent by post to each contributory. The petitioner then procured a list of contributories from Mr. Cooke, who had been one of the solicitors to the

(1) 11 & 12 Vict. c. 45.

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company, and filed the same in the Master's office. On the 18th of June following, W. C. Spiller was appointed official manager of the company; and on the 2nd of July he sent by post to each of the contributories a notice that his name was included in the list, and also of the time and place appointed by the Master for settling such list. On the 9th of July following, the meeting was held for settling the list of contributories, and an objection was then taken by Samuel C. Marsh and other alleged contributories, who had entered their appearances before the Master, that no proper list of the contributories had been filed in the Master's office. It appeared that the list of contributories which had been filed was prepared and verified by Mr. Cooke and not by the official manager; but on the objection being taken, the official manager handed in to the Master a list, signed by himself, and alleged to be a copy of the one prepared by Mr. Cooke. The Master was of opinion that there was no list before him upon which he could proceed, and that the alleged contributories who had entered their appearances and had appeared before him were entitled to their costs of so appearing, and he ordered that such costs, when taxed, should be paid to such alleged contributories out of the general estate of the company; and the Master adjourned the said meeting to the 1st of November following. Marsh then moved before the Vice Chancellor Knight Bruce, that the order of the Master as to the costs of the alleged contributories might be varied, by directing that the said costs, when taxed, might be paid to the parties by the official manager personally, or that the said costs might be paid to the parties by the official manager, and that such costs, when paid, might be allowed to him out of the general estate of the company. Whereupon his Honour made an order, directing that the motion should stand over until further order, with liberty to any of the parties interested to apply as they might be advised. Marsh thereupon renewed his motion, by way of appeal, before the Lord Chancellor.

Mr. Roundell Palmer, for the motion.

Mr. J. Russell and *Mr. Roxburgh*, contra.—The 26th, 59th, 64th, 76th, 77th,

95th, 96th, 103rd, 104th, 105th and 1 sections of the Joint-Stock Company Winding-up Act, 1848, were referred

The LORD CHANCELLOR.—I need not discuss here how far the official manager might be excused for that which has taken place in the Master's office; for the question upon this motion is, whether the Master under this act has jurisdiction to order the official manager to pay personally the costs of the irregularity. The 95th section of the act only applies to the bursement of the official manager out of the assets of the company, except in cases where he has been guilty of irregularity, and does not contemplate the case of the official manager being ordered personally to pay the costs of any other party. The 96th section is the most important, because, in my opinion, of its construction, it is no authority to the Master to interfere in the way now contended for. It directs that the Master in any proceedings referred to him under the act, shall exercise all the powers and authorities which he might exercise under the practice of the Court, in any matter referred to him by a decree or order made and pronounced in a suit. If by the practice of this Court, in a reference directed in a suit, the Master would have had jurisdiction to order the official manager to pay the costs of a party, then the 96th section would have brought this case within the rule. But the practice of this Court does not do so. The error of the act seems to consist in this, namely, in taking away the jurisdiction of this Court, and giving to the Master the initiative, and then, instead of giving him power to give costs generally, only giving him such discretion as to the costs as he would have had under a reference directed in a suit. But under the 95th and 96th sections the Master would have had no such power. Then, it is said that the 103rd section cured this; but it is clear from the provisions of that section that it only applies to such costs as the Master had authority to adjudicate upon to be paid; it gives him no general jurisdiction over the costs in question, but in no other terms provides another mode by which such costs are to be paid. I am of opinion that the act does not give the Master

authority to give costs against the official manager personally; and I have no power to authorize the Master to give such costs. The motion, therefore, must be refused, with costs.

M.R. { *In re* THE DIRECT LONDON AND
Nov. 9. { PORTSMOUTH RAILWAY COM-
 { PANY.

*Costs—Act of Parliament, Petition under
—Prosecution stopped by a subsequent
Enactment.*

A petition was presented to wind up and dissolve a railway company, incorporated by act of parliament. By a subsequent enactment, such railway companies were excepted out of the provisions of the Joint-Stock Companies' Winding-up Act, under which the petition was presented. The petition was dismissed, without costs.

An injunction was granted, in June last, at the instance of Abraham Cohen, to restrain the Direct London and Portsmouth Railway Company, of which he was a shareholder, from applying the capital of the company, or any part thereof, in making a railway from Epsom to Leatherhead, or otherwise than for making and completing the entire line to Portsmouth, pursuant to the powers vested, or to be vested, in them by act of parliament—*Cohen v. Wilkinson* (1). This injunction restrained the directors from making the railroad, and the compulsory powers for taking the land for the remainder of the line expired. A petition of appeal against this decision was presented to the Lord Chancellor; but on the 24th of July 1849, before it could be heard, Abraham Cohen presented a petition for the dissolution and winding up of the company under the Joint-Stock Companies Winding-up Act, 11 & 12 Vict. c. 45; this act was amended by the 12 & 13 Vict. c. 108, which declared that it should apply to divers partnerships, associations, and companies consisting of not less than seven members, but not to railway companies incorporated by act of parliament. The

(1) 18 Law J. Rep. (N.S.) Chanc. 411.

consequence was, that the petition, which had been presented by A. Cohen, could not be prosecuted, and the question now was, in what way the costs which had been incurred, should be provided for.

Mr. Turner and Mr. Cole, for Mr. Cohen.

Mr. Malins and Mr. Bovill, for the Railway Company.

THE MASTER OF THE ROLLS.—No blame can be imputed to either party. I therefore think it my duty to dismiss the petition, without costs.

K. BRUCE, V.C. { *In re* THE ROYAL BANK
Feb. 16. { OF AUSTRALIA.

*Company — Winding-up Act — Costs,
Security for.*

A petition for winding up a company was presented by a petitioner who was resident out of the jurisdiction:—Held, that he was liable to give security for costs, as in the case of the plaintiff in a suit resident out of the jurisdiction.

A petition was presented by J. Latta, who resided at Edinburgh, for winding up the Royal Bank of Australia.

Mr. J. Parker and Mr. Cairns, for the petitioner.

Mr. Russell, Mr. C. Webster, Mr. Bacon, and Mr. Anderson, for two sets of directors, contended that, as the petitioner was not resident within the jurisdiction, he was bound to give security for costs; and cited In re Passmore (1) and Ex parte Seidler (2).

KNIGHT BRUCE, V.C. said he thought that security for costs ought to be given, as in the ordinary case of a plaintiff out of the jurisdiction.

(1) 1 Beav. 94; s. c. 8 Law J. Rep. (N.S.) Chanc. 229.

(2) 12 Sim. 106.

K. BRUCE, V.C. { *In re* THE WARWICK
Feb. 22. } AND WORCESTER RAIL-
WAY COMPANY.
Ex parte Pell.

Company—Winding-up Act, ss. 28. and 63
—Production of Papers—Orders ex parte.

The Master charged with the winding up of a company is not authorized to make orders on particular individuals for the production of papers, &c. ex parte or without notice to them.

The Warwick and Worcester Railway Company was ordered to be wound up under the Joint-Stock Companies Winding-up Act, 1848.

By an order, dated the 15th of January 1850, the Master charged with the winding up of the company ordered "that Mr. G. Pell should, on or before the 25th day of January instant, or within seven days after service thereof, deliver up to Henry Ernest, of, &c., the official manager of the company, a certain indenture, bearing date the 10th of October 1845, and made between (describing the parties), being or purporting to be the parliamentary contract of the company, and also a certain other indenture, bearing even date with the before-mentioned indenture and made between the same parties, and also all deeds, books, papers, and writings of and belonging to the said company in his custody or possession."

This order was made by the Master, *ex parte*, without any notice having been given to Mr. Pell of any intention of its being applied for, or any opportunity afforded him of stating his reasons why it should not be granted.

This was a motion for discharging the order of the Master for irregularity, on the ground that it ought not to have been made *ex parte*.

By the 28th section of the Joint-Stock Companies Winding-up Act, 1848, it is enacted, "that *immediately after* the appointment of an official manager, the Master shall, by order, direct that all the books of account, deeds, instruments, cash, bills, notes, papers, and writings of and belonging to the company shall, within a

time to be limited in that behalf, be delivered up, and the same shall accordingly be delivered up, by every person in whose custody, possession, or power, the same may be, to the official manager, and shall be kept by him."

By the 63rd section of the same act it is enacted, "That it shall be lawful for the Master to summon before him any person, whether a contributory or not, who shall be, or shall be deemed to be, capable of giving information concerning such company, and also to require such person so summoned to produce, and, if a contributory, to leave with the Master or the official manager, any books, papers, deeds, writings, or other documents in the custody, possession, or power of such person, which may appear to the Master to be necessary or expedient to be produced or left as aforesaid; and every person so summoned who shall refuse to be sworn, &c. or to produce any such book, paper, deed, writing, or document, shall be liable to be committed to the Queen's Prison: Provided always, that every such default or refusal shall be certified by the Master, and thereupon such order shall be made by the Court upon motion for that purpose, of which notice shall be given to the person sought to be affected as the Court shall see fit."

It was stated, at the hearing of the motion, in answer to questions put by the Court, that Mr. Pell was not the solicitor of the company, and that he had reasons (founded on his holding the documents in question on behalf of other persons) for contending that the order ought not to have been made.

In the course also of hearing the motion, a question was put by the Court as to the practice in the Master's offices as to such orders, in answer to which a gentleman in court stated that he was the official manager in several cases, and that the practice was that such orders were made absolute and *ex parte* in the first instance, and that if any person had any grounds of complaint in respect of any such order, he came before the Master and stated them, and that, if he succeeded in satisfying the Master, the order was not acted upon.

Mr. Malins and *Mr. Winstanley*, for the motion, contended that it was quite irregu-

lar to make such orders as the one complained of, *ex parte*, and commented on the 28th and 63rd sections of the act.

Mr. Russell contended that the act authorized the making of such orders *ex parte*; and relied on the practice as set forth in the statement of the case.

KNIGHT BRUCE, V.C.—I observe that the order in question is a specific order upon a person named, and not a general order. The order is this—[His Honour read the order].—Looking at the two sections of the act, I observe that there is an observable difference between them. The 63rd section empowers the Master to make an order relative to books, papers, &c. in the hands of contributories, trustees, bankers, agents, &c. after the appointment of the official manager. The 28th is this, that *immediately after* the appointment of the official manager, the Master shall direct, &c. It appears to me that the object of the legislature must be taken to be, that a general direction should be given at the outset of the proceedings in the Master's office, by means of the 28th section, and that this section was not intended to be directed against particular individuals, or to interfere with their rights. I think that the act ought not to be so interpreted that any individual should be liable upon an *ex parte* order, without absolute necessity, and I do not see any necessity here. With great deference and respect for the Master's opinion in this case, (as well as the opinions of the Masters who are stated to have adopted this practice,) I must decide that the order in question, which has been made, entirely and in every sense, *ex parte*, and directed specifically against a particular person, be discharged.

His Honour then said, that before deciding as to the costs, he wished to know if *Mr. Malins* were willing to waive the technical point, and to have the question as to the right of *Mr. Pell* to retain the papers then discussed.

Mr. Malins read a letter shortly referred to in the judgment, and stated that no answer had been returned to it, and that, under these circumstances, he hoped

that the motion might be at once dismissed, with costs.

Mr. Russell read another letter also referred to in the judgment.

KNIGHT BRUCE, V.C. said that in the letter read by *Mr. Malins* there was an offer on the part of *Mr. Pell* to submit the question to the Court unconditionally. To this letter no answer had been returned. In the letter read by *Mr. Russell* there was an offer on the part of the official manager to submit the question to the Master, clogged, however, with many conditions. He thought, then, that the proper order would be to dismiss the Master's order; the costs of both parties to be paid out of the estate.

K. BRUCE, V.C.
Nov. 19.

{ *In re* KOLLMAN'S RAIL-
WAY LOCOMOTIVE AND
CARRIAGE IMPROVE-
MENT COMPANY.
Ex parte Kuper.

*Company—Winding-up Act—Contribu-
tories—Bankrupt.*

A bankrupt, at the time of his bankruptcy, held shares in a company afterwards ordered to be wound up. The Master placed his assignees in the list of contributories, in respect of these shares, with the addition of the words "as assignees":—Held, that the Master had rightly so placed them.

Mr. Kuper, the holder of thirty shares in the above-named company, became a bankrupt in 1848, and obtained his certificate in June 1849.

By an order dated in February 1849, made under the Joint-Stock Companies Winding-up Act, this company was ordered to be wound up, and the Master charged with the winding up of the company placed the assignees of *Mr. Kuper* in the list of contributories in respect of the thirty shares, but with the addition of the words "as assignees."

The assignees now moved that their names might be excluded from the list.

Mr. Bacon and *Mr. J. Baily*, for the motion, contended that, although the bank-

rupt's estate might be liable to the calls to be made, the method adopted was not the proper one.

Mr. Glasse, for the official manager.

KNIGHT BRUCE, V.C.—As I understand, the bankrupt, when he became a bankrupt, held these shares. I think, therefore, that his estate ought to be placed on the list of contributories. The question is, whether more is done by the Master's list or book than that. If there were any fear or apprehension that the assignees would be held to be personally liable, I would exclude them from the list, but no such apprehension is suggested. Their contention is, that they could not be there, even as representing the estate. I have not heard any argument in support of that contention. I must refuse the motion, with costs.

K. BRUCE, V.C. } *In re KOLLMAN'S RAIL-
Feb. 8, 16, 23. } WAY LOCOMOTIVE AND
CARRIAGE IMPROVE-
MENT COMPANY.
Ex parte Ellis.*

*Company—Winding-up Act, Section 46.
—Substituted Service.*

The Master charged with the winding-up of a company has power, under the 46th section of the act, to direct substituted service to be made of any order under the act.

The above-mentioned company was ordered to be wound up under the Joint-Stock Companies Winding-up Act, 1848, and a call was made on Mrs. Ellis, one of the contributories.

Mr. Glasse moved that the order for payment might be served on the solicitor of Mrs. Ellis, on an affidavit shewing that personal service could not be effected.

An order was taken accordingly.

On a subsequent day, *Mr. Glasse* mentioned that the Registrar had stated that he had a difficulty in drawing up the order, in consequence of the language of the 46th section of the act, and that the Master charged with the winding up of the company had wished that the matter should

be mentioned to the Court that the should be made expressly by the Court.

KNIGHT BRUCE, V.C. said, that he would make the order if it was wished.

On a subsequent day *Mr. Glasse* mentioned the 46th section, which was as follows: "That it shall be lawful for the Master, in his discretion to order the advertisement of the company in the *London Gazette* or otherwise, and to serve on any person, in such manner as he shall think fit, of any order or decree made in and about the winding up of the affairs of any company under this Act." He then stated that the Master had expressed a doubt whether it was within his jurisdiction to make the order, and that a wish had been expressed, as well as reference to this as to other cases, that the Honour would decide the point.

KNIGHT BRUCE, V.C. said, that, in reading the section to which his attention had been called, he was of opinion that the Master had authority to order substituted service without the parties coming to the Court. He had understood that Master Farrer was of that opinion. He thought that it would be sufficient to intimate to the Master in this case that this Court considered that he might direct the substituted service of the order in question.

K. BRUCE, V.C. } *In re KOLLMAN'S
Feb. 21. } WAY LOCOMOTIVE
CARRIAGE IMPROVE-
MENT COMPANY
Ex parte Beresford.*

Company—Winding-up Act—Contributories—Forfeited Shares.

Shares in a company were allotted to persons who paid some sums for calls and deposits. The deed of settlement of the company, which was dated in March 1845 (after such payments had been made) contained a clause that, if any shareholder neglected or refused to execute it before a certain day, he should be in the power of the directors to forfeit his shares. A. did not execute the deed, and the shares were declared

forfeited by the directors:—Held, that A. was not a contributory.

In August 1844, five shares in the above-named company were allotted to Mr. Beresford, and, previously to June 1845, he had paid 8*l.* per share for calls and deposits.

The deed of settlement of the company bore date the 18th of March 1845. The 105th clause of that deed was as follows:—"That if any of the several persons, parties hereto, or whose names are mentioned in the schedule hereunder written, or either of them, shall neglect or refuse to execute these presents on or before the 18th day of April next ensuing, it shall be lawful for a board of directors, at any time thereafter, to declare in writing the share or shares of the person or persons who shall so neglect or refuse, as aforesaid, or any of them, forfeited to the company; and, in that case, the share or shares so declared to be forfeited shall be actually forfeited, and shall thenceforth belong to the company, freed and discharged from all right or interest therein, of the person or persons previously entitled thereto; anything hereinbefore contained to the contrary thereof in anywise notwithstanding."

This deed was not executed by Mr. Beresford.

By a resolution of a board of directors held in August 1845, it was ordered that Mr. Beresford should be informed that, if he did not execute the deed of settlement, his shares would be forfeited, and such notice was given accordingly.

At another board of directors held on the 26th of August, 1848, it was declared that Mr. Beresford's shares should be forfeited.

Both these resolutions were entered in the minute-books of the company.

The company was ordered to be wound up under the act. Under the above circumstances, the Master charged with the winding up of the company did not insert Mr. Beresford's name in the list of contributories.

A motion was now made, by way of appeal, that Mr. Beresford's name should be inserted in the list of contributories.

Mr. Bacon and Mr. Glasse, for the official manager, contended that the resolutions of the directors had not had the effect of excluding Mr. Beresford's name from the list of shareholders, and that he still continued to be a shareholder, and was therefore a contributory.

Mr. Daniel, for Mr. Beresford, was not called upon.

KNIGHT BRUCE, V.C.—The resolution of forfeiture of the directors is not impeached as fraudulent, colourable, or collusive; nor was it in contest before the Master whether it had been accepted or submitted to. On the contrary, the whole scheme of the contention before the Master proceeded upon this,—that the resolution of forfeiture had been accepted and submitted to. Under these circumstances, it is too much to say, as against Mr. Beresford, that the question is now to be mooted whether the directors did or did not act with strict and perfect regularity in taking that step. I agree with the Master's conclusion in any event. Perhaps, if it were necessary to say so, I should agree in the steps by which he arrived at that conclusion. With the conclusion I certainly agree, and refuse the motion, with costs.

K. BRUCE, V.C. { *In re* THE TRING, READING AND BASINGSTOKE RAILWAY COMPANY.
Feb. 22, 23. { *Ex parte* Cox.

Company—Winding-up Act, Section 66.
—Jurisdiction of Master—Contributories.

In 1845 a company was projected, and A. became a shareholder. Shortly afterwards a sum of money was paid to A. on behalf of the company. The company was ordered to be wound up, and A. was placed in the list of contributories. In the Master's office the official manager claimed, as a debt due to the company from A, the sum which had been paid him in 1845. The Master, by his report, found that this sum and interest were due from A. as a member and contributory, and ordered him to pay it:—Held,

that (without entering into the merits of the question) the sum, if due from A, was not due from him as a contributory, and the Master's report was ordered to be discharged.

In the early part of the year 1845 the Tring, Reading, and Basingstoke Railway Company was projected. Messrs. W. Cox & H. P. Cox were shareholders in the company, and also acted as their share-brokers. In 1845 the sum of 6,300*l.* was paid by the company to Messrs. W. & H. P. Cox, under circumstances which it is unnecessary to detail.

The company was ordered to be wound up under the Joint-Stock Companies Winding-up Act, and Messrs. W. Cox & H. P. Cox were placed on the list of contributories. In the Master's office the official manager made a claim against Messrs. W. & H. P. Cox for the sum of 6,300*l.*, which, as before mentioned, had been paid to them in 1845, and interest, on the ground that it was a debt due from them to the company.

The 66th section of the Joint-Stock Companies Winding-up Act, 1848, is as follows:—"That after the appointment of the official manager of the company, the Master shall, from time to time, by order to be made, *upon the application of the official manager, or of any contributory, order and require any contributory, trustee, receiver, banker, or agent to pay, deliver or transfer forthwith or within such time as the Master shall direct, into the hands of the official manager, any sum or balance, books, papers, estate, or effects which shall happen to be in his hands for the time being, and to which the company is primâ facie entitled, or which, in the case of a contributory shall appear to the debit of his account, as contributory with the company, as entered in the books of the company; anything in the present practice of courts of equity to the contrary notwithstanding.*"

The Master charged with the winding up of the company made the following report and order:—"I, R. R., the Master charged with the winding up of this company, upon the application of W. C. W., of, &c., the official manager of this company, and, in the presence of W. Cox and H. P. Cox, of &c., stock-brokers, and co-

partners, members and contributors of the said company, and upon reading Master here set out the evidence adduced by the official manager in support of his claim [the said W. Cox & H. P. Cox were, on the 28th of October 1845, and have ever since continued to be, and are now, contributors and members of the said company that on the said 28th day of October 1845 the sum of 6,300*l.*, part of the money of the said company, was lent and advanced by or on behalf of the said company to them, the said W. Cox & H. P. Cox, *as such members and contributories* that they agreed to repay the same to the said company, with interest, at the rate of 5*l.* per cent. per annum, from the day of October 1845; and that the principal sum of 6,300*l.*, together with the interest thereon after the rate of 5*l.* per cent. per annum, from the said 28th day of October 1845, still remains due and owing from the said W. Cox & H. P. Cox *as such members and contributories as aforesaid* to the said company. I therefore order the said W. Cox and H. P. Cox, and each of them, do pay to W. C. W., the official manager of the said company, at his house in, &c., on the 1st day of March 1850 the principal sum of 6,300*l.*, together with the further sum of 1,865*l.* for interest thereon, after the rate of 5*l.* per cent. per annum, from the said 28th day of October 1845 up to the said 1st day of March 1850, which sum I find to be due from the said W. Cox & H. P. Cox *as such members and contributories of the said company* to the said company, and to be a sum in their hands to which the said company is *primâ facie* entitled, and to be a sum which it is necessary should be paid by the said W. Cox & H. P. Cox *as such members and contributories as aforesaid*, in or towards the winding up of the affairs of the said company."

Messrs. W. & H. P. Cox now moved that the above-mentioned order of the Master should be discharged.

Mr. Malins and *Mr. Fooks*, for the motion.—According to the proper construction of the 66th section the sums therein mentioned must be taken as sums due from a contributory, in the

acter of a contributory, and therefore in respect of matters which occurred after the order for winding up the company. It cannot be a sum due in respect of transactions between Messrs. W. & H. P. Cox and the company before the order made for winding up the company. Whether the sum here in contest is or is not due to the company from Messrs. Cox is not the question. Assuming, for the sake of argument, that it is rightly due, this is not the way of getting it; and the order of the Master not being authorized by the act, must be discharged.

Mr. Russell, Mr. W. T. S. Daniel, and Mr. Bramwell, for the official manager.—The word in the 66th section “*as*” in connexion with the word “contributory” may be taken to be—*being a contributory*, and the Master’s order is right in form as well as substance. Supposing, however, that “*as*” is to be strictly construed, and that that part of the 66th section is not applicable to this case, still the Master’s order may stand. The Master has jurisdiction to dispose of all matters in dispute between the company and any contributories, and all matters in dispute between one contributory and another, or one class of contributories and another class. This appears from the general policy of the act, and particularly from the 14th, 49th, 50th, 91st, 92nd, and 118th sections of the act. Suppose, then, that the Master had simply said “*Messrs. Cox owed this money to the company, and let them pay it before a certain time,*” the order would have been correct in point of form. The only question would then have been the merits of the case, and these we are now ready to go into. In this view, the words in the order “*as such members and contributories,*” wherever they occur, may be rejected as surplusage. The matter then stands thus:—First, it is contended that the order is right in form and substance; secondly, that it is, at any rate, right in substance, and though there be an objection to the form, that objection is not fatal, and may be properly disregarded. There is also another view. The 34th section of the “*Joint-Stock Companies Winding-up Amendment Act, 1849,*” (1) is

as follows:—“*That, where any appeal shall be brought, or rehearing moved for, under the said act or this act, it shall not be incumbent on the Court before which such appeal is brought or rehearing moved for to reverse the order or other proceeding complained of for want of form only, nor unless such Court be of opinion that the substantial merits of the case require such reversal.*” Supposing then, thirdly, that the objection to form would, but for this section, have been fatal, as it is merely an objection of form, the Court has power, by means of the section, to overrule the objection.

Mr. Fooks stated that he had no objection to that part of the order in which the Master found Messrs. Cox to be contributories and members.

KNIGHT BRUCE, V.C.—It has been contended that three phrases in this order or certificate are surplusage, or immaterial, or capable of rejection. Between these three phrases, perhaps, there is not much difference: one is “*as such members and contributories,*” another is “*as such members and contributories as aforesaid,*” the other is “*as members and contributories of the said company.*” I am of opinion that I am not authorized to consider these words as surplusage, or as immaterial, or as capable of being rejected. I believe that the learned Master did not mean them to be so considered. So far, I believe, I am not differing from the learned Master.

The next question is, whether the words are borne out by the evidence. The Master must have considered that such words were the necessary or proper result of the evidence, or he would not have inserted them. I cannot view the evidence as the learned Master has done. I am obliged to state and act upon the effect which the evidence has upon my mind, and that is, that it is not proved that these three passages which I have read were the result of the facts. The consequence is, that, without entering at all into the very important question, whether the Master has jurisdiction under this act to order these gentlemen to pay the money, and compel them to pay it, I think that I must discharge the order, except in the respect mentioned by *Mr. Fooks*,

(1) 12 & 13 Vict. c. 108.

and send the matter back to the Master. The order, therefore, will be that, without prejudice to any question, the certificate, report, or order of the 12th of February be discharged, save so far as it finds that W. Cox & H. P. Cox were, on the 28th of October 1845, and have ever since continued to be, and are now, contributories and members of the company; and refer it back to the Master to review his report, certificate, or order, and reserve the costs, with liberty to apply.

L.C. }
Nov. 5. } SAINTER v. FERGUSON.

Injunction—Breach of Contract—Liquidated Damages recovered at Law.

A, in consideration of B. engaging him as his assistant at a salary, agreed not to practise as an apothecary in the town of M, nor within seven miles thereof, under a penalty of 500l. A. being discharged by B. commenced practising at M. B. then filed his bill against A, and moved for an injunction to restrain him from so practising, when the motion was ordered to stand over, with liberty to B. to bring such action as he might be advised. B. brought his action for breach of the agreement, and recovered 500l. liquidated damages, together with the costs of the action, and afterwards proved for such costs under the bankruptcy of A, but not for the damages:—Held, that the legal contract being at an end by the judgment in the action and the proof under the bankruptcy, the plaintiff had no equity for an injunction.

On the 2nd of March, 1848, the plaintiff, who was practising as a surgeon and apothecary at Macclesfield, engaged the defendant as his assistant; and on the same day articles of agreement were entered into by them in the following terms:—"In consideration that J. D. Sainter will engage me as an assistant to him as a surgeon and apothecary, I, the said W. E. Ferguson, promise him, that I will not at any time practise in my own name or in the names of any other persons in Macclesfield, or within seven miles thereof, under the penalty of 500l. And I, the said J. D. Sainter, do agree to engage the said W. E. Ferguson, as assistant to me, as a surgeon

and apothecary, on the terms aforesaid." The defendant thereupon entered upon such employment at a salary of 100l. a year, and continued in such employment until the 24th of August 1848, when he was discharged by the plaintiff on the ground of misconduct. The defendant immediately upon such discharge took a house in Macclesfield, where he commenced and carried on business as a surgeon and apothecary. The plaintiff, in September 1848, filed his bill against the defendant stating the above facts, and praying that the defendant might be restrained from so practising; and, on the 22nd of the same month, moved before Knight Bruce, V.C. for an injunction. The motion was ordered to stand over, with liberty to the plaintiff to bring such action against the defendant as he should be advised. The plaintiff then commenced an action of assumpsit on the agreement against the defendant, and on the trial recovered a verdict for 500l. damages, and the costs of the action. On a motion before the full Court for a new trial, the Court of Common Pleas held that the verdict was right, and that the 500l. was to be considered as liquidated damages. The defendant subsequently became bankrupt, and the plaintiff proved under the bankruptcy for the costs in the action. On the 12th of June 1849, the plaintiff renewed his motion for an injunction before Knight Bruce, V.C., when His Honour made an order for an injunction in the terms of the prayer of the bill.

The defendant now moved before the Lord Chancellor to discharge that order.

Mr. Bacon and Mr. Lewin, in support of the appeal.—A court of equity will not interfere by injunction where the agreement between the parties is for a sum of money by way of liquidated damages on breach of the contract—*Woodward v. Gyles* (1); though it is otherwise where there is a penalty only for securing the enjoyment of a collateral object—*Sloman v. Walter* (2). The same distinction was taken, by Lord Mansfield, in *Lowe v. Peers* (3). The case of *French v. Macale* (4)

(1) 2 Vern. 119.

(2) 1 Bro. C.C. 418.

(3) 4 Burr. 2228.

(4) 1 Con. & L. 459.

contains a review of all the authorities. The plaintiff has availed himself of his legal remedy by proving under the bankruptcy for his costs, which is a statutable execution — *Ex parte Dickson* (5), *Ex parte Schlesinger* (6), and has therefore received the price of the breach of the agreement from the defendant.

Mr. J. Russell and *Mr. Glasse*, for the plaintiff.—The plaintiff has not lost his equitable remedy by his proceedings at law. That course was adopted by the directions of the Court below, merely to establish the legal validity of the agreement. The plaintiff has not sought to enforce the payment of the 500*l.* damages recovered in the action, and the Court might restrain him from so doing as the terms upon which the injunction would be granted.

The LORD CHANCELLOR.—I have in vain asked for an authority that the Court will restrain by injunction a breach of an agreement which no longer exists. Is the defendant to pay 500*l.* as the price of doing what he has done, and afterwards is this Court to enjoin him from doing it? When a party comes here for an injunction to restrain an act which the other party has undertaken not to do, he comes here because his remedy at law is deficient. But the whole jurisdiction is founded upon a legal contract; and if that legal contract no longer exists, the right to the injunction is gone also. Here the defendant has contracted not to practise within certain limits under a penalty. According to the construction of a court of law, this is a contract that he will not practise within those limits, or else he will pay 500*l.* The plaintiff applying for an injunction to restrain the breach of the contract, the Court, according to its ordinary course, directed the motion to stand over until he should have established his right at law. If the plaintiff had foreseen the difficulty which has arisen, he might have asked the Court to put the matter in a train for inquiry without foreclosing him from his equitable remedy. The order pronounced below put the plaintiff under no restrictions; yet he thinks proper to

go on with his action. It was his own choice; and he never asked the Court for any limited order to keep his right alive. What, then, is the effect of his proceedings at law? It is just as if he had brought his action in the first instance, and had then come to this Court for an injunction, after having obtained liquidated damages which the Court of law has decided to be in lieu of the contract. What has taken place here has not altered the rights of the parties: for all the Court below did was to refuse the motion until the legal right was established. Proceedings at law have now been had, and a judgment has been obtained for liquidated damages. Is it now competent to the Court to interfere by injunction, on the ground of an equitable right arising out of a legal contract which no longer exists? If that were to be done, it is obvious that the plaintiff would be receiving 500*l.* for the breach of the contract, and the Court would nevertheless be saying to the defendant "though you have purchased the right to practise by payment of the 500*l.*, you must still be restrained." But there is no such practice in this Court, and the plaintiff has no such choice as that contended for; therefore I must discharge the Vice Chancellor's order, with the costs of the motion in the court below.

Mr. J. Russell asked to be allowed to set off the costs of the motion against the costs of the plaintiff in the action; but

The LORD CHANCELLOR refused to make any such order.

L.C. }
Nov. 22. } UNDERWOOD v. JEE.

Administration of Estate — Creditors' Suits—Staying Proceedings.

Two creditors' suits were instituted against the same defendant for administration of the same estate, and a decree was obtained in the suit secondly instituted. A motion on the part of the defendant to stay the proceedings in the first suit was refused, on the ground that the first suit sought more extensive relief than the second.

(5) 1 Rose, 98.

(6) 2 Glyn & J. 392.

On the 11th of December 1848, the bill in *Underwood v. Jee*, which was a creditors' suit, was filed against the widow and administratrix of John Jee, who had died intestate in 1847. This bill alleged, among other things, that the widow had carried on trade with her late husband's assets, and it prayed an account of the gains and profits made thereby, and for an injunction and a receiver.

The widow, by her answer, admitted the carrying on of the trade as charged, but denied that she had applied any part of the profits to her own use, save in the maintenance of herself and her child.

On the 27th of December 1848, another creditors' bill, *Smith v. Jee*, was filed against the administratrix, seeking merely the usual accounts of the intestate's personal estate, and, in case that should be found insufficient for the payment of his debts, then seeking an account of the intestate's real estate. To this bill an answer was soon afterwards put in, and on the 24th of February 1849 the common decree in a creditors' suit was obtained.

On the 17th of March 1849 the defendant moved before the Vice Chancellor of England in the cause of *Underwood v. Jee* that all further proceedings in that suit might be stayed. The motion was refused, with costs.

In April following an order was made upon petition in the suit of *Smith v. Jee* for a reference to the Master to inquire whether it would be desirable that the testator's business should be carried on for the benefit of his estate. The Master having reported in favour of such a proceeding, the decree was amended in that respect, and the defendant was ordered to account before the Master for the profits to be made by her in carrying on such business.

The defendant now renewed before the Lord Chancellor the motion to stay the proceedings in the suit of *Underwood v. Jee*.

Mr. Rolt and *Mr. Miller*, for the motion.—The suit of *Smith v. Jee* is more comprehensive than the first suit; for it embraces an account of the real estate. By the order made upon the petition, the account of the future profits of the

trade will be taken. If necessary Court may make an order similar to that made in *Dryden v. Foster* (1), limiting proceedings in *Underwood v. Jee* to taking the accounts of the profits of the business since the death of the intestate. In all other respects that suit is useful.

Mr. James Parker and *Mr. S. J. Parker*, contra.—The relief prayed by the bill in *Underwood v. Jee* is much more extensive than that prayed in the other suit. The Court, therefore will not stop the production of it—*Rigby v. Strangways* (2). The order made upon the petition relates to the future profits of the business.

The LORD CHANCELLOR.—As the bill stood when it came before the Vice Chancellor, I think his order, refusing the motion, was right; and the question is, whether the order which has since been made upon the petition makes any difference. Does that order and the decree in the second suit, taken together, provide for all that the creditor in the first suit has a right to ask for? The first suit seeks an account of the profits of the intestate's trade from the period of his death; but the order on the petition obviously only relates to prospective profits; the anterior profits are not embraced by it. The first suit, then, has an effect beyond that sought by the second suit, and is embraced in the existing decree. The motion, therefore, as to staying proceedings, does not apply here. The plaintiff must, however, be allowed to prosecute that suit, but at his own risk; for if at the hearing it shall appear that he has done so unnecessarily, he will have to pay the costs of the litigation. The motion must be refused, with costs.

V.C. }
Jan. 14. } *In re CROYDEN'S TRUST*

Trust and Trustee—Payment of Debts into Court under Trustee Act—Complaint of Trustees.

Trustees are not bound to take any steps in ascertaining the validity of claims

(1) 6 Beav. 146; s. c. 12 Law J. Rep. Chanc. 189.

(2) 2 Phil. 175.

the trust fund, but may discharge themselves of all responsibility whenever they please by paying the fund into court under the Trustee Act, and they will be entitled to their costs.

This was a petition for the payment out of court of a sum of money paid in under the late Trustee Act (1). It appeared upon the petition that under the marriage settlement of James Croyden and Mary Hyde, dated in December 1828, the said James Croyden covenanted to pay the sum of 500*l.* to the trustees of the settlement, upon trust to pay the dividends thereof to his intended wife for life, and after her decease to the children of the marriage; and, in failure of children, there was an ultimate trust to transfer the fund to the survivor of the husband and wife, his or her executors, administrators, or assigns. The marriage took place, and the wife died in 1848, without having had any children, consequently the ultimate trust for the benefit of the husband took effect.

Previously to the death of the wife, James Croyden assigned over the whole of his property to trustees for the benefit of his creditors. The trustees of the settlement paid the dividends of the trust fund to the wife during her life, but upon her death the trustees of the creditors' deed applied to the trustees of the settlement for payment of the trust fund, and at the same time they obtained the written admission of James Croyden that they were entitled to the fund. The trustees of the settlement, however, alleged that a Mr. Cooper, a solicitor, claimed a lien upon the settlement for costs, which settlement was in the possession of the said Mr. Cooper, and that they had no personal knowledge of the deed of assignment, and thereupon they paid the trust fund into court under the Trustee Act. The petition was presented by the trustees of the creditors' deed for payment of the money to them; and it was contended, on behalf of the petition, that the trustees of the settlement were not justified in the course they had pursued, and it was asked that they might be ordered to pay the costs occasioned by the transfer into court.

(1) 10 & 11 Vict. c. 96.

Mr. C. Hall appeared in support of the petition.

Mr. Greene, for the trustees of the settlement, contended that they were entitled to their costs, as it was evident that there had been some doubt as to the title to the fund, and the trustees were not bound to incur any risk, but were entitled to take advantage of the Trustee Act, to save themselves from all responsibility.

Mr. Walford appeared for Mr. Cooper.

The VICE CHANCELLOR said it was clear that the trustees might have been subject to some trouble in ascertaining the claims made upon this fund, and he did not think they were bound to take that trouble. The parties had evidently disagreed upon the subject, and there was no obligation upon them to take any responsibility; but they might discharge themselves from the trust whenever they pleased, by paying the money into court. He thought, therefore, that they were entitled to their costs.

V.C. }
Jan. 12. } *In re GORFETT'S TRUST.*

Will — Legal Estate — Securities for Money—Money invested on any Security.

*A testator gave and bequeathed all his stock in trade, book debts, securities for money, money in the funds and all his household goods, &c. to his wife. He also gave and bequeathed whatever money he had in the Bank, or invested on any security, and also all the residue of his personal and testamentary estate, goods, chattels and credits to his trustees upon certain trusts therein mentioned:—Held, that the legal estate in certain messuages, which were conveyed to the testator upon trust to pay himself a sum of 300*l.*, and to pay the surplus to the person conveying the same, did not pass by the will.*

This was a petition under the act 1 Will. 4. c. 60, for a reference as to whether certain infants were trustees within the meaning of the act; and a question was raised whether the legal estate in

property, conveyed to a testator upon trusts for sale, passed by his will.

The petition stated that by an indenture dated in November 1837, certain freehold and leasehold messuages in William Street were conveyed by William Gorfett to John Smith and his heirs, upon trust to sell the same, and in the first place to pay himself the sum of 300*l.* which had been advanced by him to the said W. Gorfett, and then to pay the residue thereof to the said W. Gorfett, his executors, administrators or assigns.

The petition further stated, that the said J. Smith, by his will dated in December 1838, gave and bequeathed all his stock in trade, book debts, securities for money, money in the funds and all and singular his household goods and furniture, plate, linen, glass, china and earthenware belonging to him at the time of his decease, subject to the payment of his debts, to his wife, her executors, administrators and assigns; and as to, for and concerning his freehold messuage in Richmond Street, and his leasehold messuage in Russell Street, and also the several trusts and equities of redemption affecting the same, and the monies received upon such estates and taken as part of his personal estate, to the repayment of 300*l.* and interest, lent and advanced by him to W. Gorfett on freehold and leasehold messuages in William Street, the testator gave, devised and bequeathed the same to his trustees, their heirs, executors, administrators and assigns, upon certain trusts therein mentioned. And the testator declared that as to, for and concerning whatever money he had in the Bank, or invested on any security, and also all and singular the residue of his personal and testamentary estate, goods, chattels and credits, he gave and bequeathed the same to his trustees, and the survivor of them, and the executors and administrators of such survivor, their or his assigns, upon trust, to sell the same and invest the proceeds in manner therein mentioned, and pay the income thereof to his wife for life, and after her decease to his son John for life, and then to pay the principal to his three granddaughters.

Mr. Shapter, on behalf of the petitioner,

the only executor of the testator who had proved the will, contended that the deed of 1837 was a trust deed, and not a mortgage, and that the legal estate conveyed thereby to the testator was not devised by his will. That the first clause in the will contained a bequest of securities for money under which the legal estate could not pass. The third clause was a gift of the residue, including whatever money the testator had in the bank or invested upon any security, but this clause was exclusively a gift of chattels which were bequeathed to the trustees, their executors, administrators and assigns, and could not be applicable to a devise of legal estate; and the second clause, whatever the testator might have intended, was certainly not a perfect devise of the freehold. There was consequently an intestacy as to the said legal estate.

Mr. Walker, contra, urged that the words contained in the first and third clauses of the will were sufficient to pass the legal estate in the messuages comprised in the deed of 1837. It would pass under the words "securities for money" in the first clause, or the words "money invested on any security, and also all and singular the residue of his personal and testamentary estate" in the third clause.

Silvester v. Jarman, 10 Price, 78.

Galliers v. Moss, 9 B. & C. 267; s. c.

7 Law J. Rep. K.B. 109.

Ex parte Barber, 5 Sim. 451.

THE VICE CHANCELLOR.—There is certainly some obscurity about this question. The contest is, whether the interest which the testator had in the property secured by the deed of 1837 should be taken to have passed by the first or last clauses in his will. Now, as to the first clause it is this, the testator gives and bequeaths all his stock in trade, book debts, securities for money, money in the funds, &c. This shews that he meant to describe debts of some kind. There is nothing in these words to shew that securities for money were intended to convey the legal estate in the securities. The words are merely thrown in between book debts and money in the funds, so as to include all money

of that nature, and then follow the words "and all and singular my household goods and furniture, plate, linen, glass, china and earthenware belonging to me at the time of my decease;" and, having made this minute detail, he continues in the next clauses—[His Honour here read the clauses in the will]. There is a difficulty in saying that the legal estate passed by any of these clauses, since you find that in the first clause he only uses the term "securities for money." In the second clause he alludes to the repayment of the 300*l.* as part of his personal estate; and in the third clause he says, whatever money he had in the Bank or invested on any security; and, therefore, if it is a mere question whether the legal estate passed, I cannot say that it did pass by either of these clauses.

V.C. }
Jan. 26. } *In re Fagg's TRUST.*

Trust and Trustee—Power of appointing new Trustees—Costs.

By an indenture of settlement three trustees were appointed. The settlement contained a power for the cestui que trust in case the trustees therein named, or either of them, should die, or be desirous of being discharged from the trusts, to appoint any other person or persons to be a trustee or trustees in the place of any such trustee or trustees so dying or being desirous to be discharged. One trustee died, and the other two were desirous of being discharged, upon which two new trustees only were substituted. The two continuing trustees refused to transfer the fund to the new trustees, upon the ground that the appointment was not properly executed, and paid the trust fund into court under the Trustee Act:—Held, upon petition for payment of the money out of court, that it was competent for the cestui que trust to appoint two trustees only, and that the old trustees were not justified in paying the money into court, and they were ordered to pay costs thereby occasioned, and their costs of the petition.

This petition was presented by Thomas Fagg and Amelia Fagg his wife; and it stated that by an indenture of settlement, dated

the 22nd of February 1831, it was agreed and declared that T. Walters, W. Walters, and A. Fagg, and the survivor and survivors of them, his executors and administrators, should stand possessed of a sum of 1,000*l.* bank annuities, which had previously been transferred into their names, upon trust to pay the dividends thereof to Thomas Fagg for life, and after his decease to Amelia Fagg his wife, if she should be then living, for her life, and after the decease of the survivor, in trust to stand possessed of the said trust monies, and the dividends, interest, and annual proceeds thereof, for such children of the said Thomas and Amelia Fagg as the said Thomas Fagg should, by deed or will appoint, and in default of appointment, upon trust to transfer the said capital sum unto the said children equally in manner therein mentioned. And it was thereby also agreed and declared, that in case the said trustees therein named, or either of them, or any succeeding or other trustees or trustee to be nominated as therein mentioned should die, or be desirous of being discharged of and from, or refuse or become incapable to act in, the trusts and powers therein declared and contained before the same should be fully performed, then and so often as the same should happen it should be lawful for the petitioners Thomas Fagg and Amelia Augusta his wife, during their joint lives, and after the decease of either of them, during his or her life, by any deed or writing under their, his, or her hands and seal or seals, to nominate and appoint any other person or persons to be a trustee or trustees in the place of any such trustee or trustees so dying, desiring to be discharged, or refusing or becoming incapable to act as aforesaid; and that as often as any such new trustee or trustees should be appointed, all the said trust stocks or funds and monies should be thereupon with all convenient speed transferred and assigned in such manner, and so that the same should be and become legally and effectually vested in the newly appointed trustee or trustees, jointly with such of the former trustees as should be willing and capable to act, or in case there should be no continuing former trustees, then in such newly appointed trustee or trustees only, upon the

trusts thereinbefore contained and declared of and concerning the same, or such of them as should be then subsisting or capable of taking effect.

That the said Alfred Fagg, one of the trustees, had departed this life, and the said Thomas Walters and William Walters had expressed their desire of retiring altogether from the trusts of the said deed of February 1831, and had requested the said Thomas Fagg and Amelia Fagg forthwith to appoint new trustees in their place; that in pursuance of such request a deed-poll was prepared for the appointment of two persons named George Fagg and William Kent as such new trustees, and the draft of such new appointment having been forwarded to the solicitors for the remaining trustees for perusal, the same was returned and approved of; but it was stated that a release to the old trustees should have been contained in the said deed; that in reply to this suggestion, the solicitor for the petitioner Thomas Fagg stated, that there would be no objection to give the release if there was, in fact, anything in respect of which a release could be required, but that a release was, at all events, no part of the appointment of new trustees; that no objection having been raised by the said Thomas and William Walters to the appointment of new trustees the same was ingrossed and executed by Thomas and Amelia Fagg; that the said Thomas Walters and William Walters delayed for some time to transfer the said trust funds into the names of the new trustees, but upon their being urged to do so, the said Thomas Walters, in answer to a letter written by the petitioners' solicitor, stated that he was unable to account for his solicitor's delay in the matter; that he was quite ready to transfer the stock, and so was the said William Walters, and they would see that it should be effected immediately. That notwithstanding such statement, and notwithstanding that the appointment of new trustees had been executed so long previously as the 10th of July 1848, the said Thomas Walters and William Walters, without any further communication with the petitioners, and without their consent, transferred the said trust fund into the name of the Accountant General of this

Court, on the 14th of August 1849, under the provisions of the late Trustee Act (1).

The petition prayed that the said trust fund of 1,000*l.* so paid into court, might be transferred into the names of the new trustees upon the trusts of the indenture of February 1831.

Mr. Bethell and *Mr. E. G. White* appeared in support of the petition, and submitted, that the old trustees Thomas and William Walters were not justified in having paid the trust monies into court; they had retired altogether from the trust, and new trustees had been appointed. It was their duty at once to have transferred the fund to the new trustees, and it was now asked that they might be ordered to pay the costs of this petition.

Mr. Bevir, on behalf of the old trustees, stated that the reason they had not transferred the fund into the names of the new trustees was, that they conceived the appointment had not been duly executed. By the settlement of February 1831 three trustees were appointed; one of those trustees had died and the other two had resigned. It was, therefore, contended, that under the power of appointing new trustees three more ought to have been substituted, instead of which two only had been appointed. Under these circumstances the old trustees were justified in paying the money into court under the Trustee Act.

The VICE CHANCELLOR.—It is plain that under the power contained in the instrument of 1831, it was competent for *Mr.* and *Mrs.* Fagg to appoint one or more trustee or trustees in the place of any trustee or trustees dying, desiring to be discharged, or refusing or becoming incapable to act in the trusts of the deed. My opinion, therefore, is, that the appointment was properly executed, and that the old trustees were not justified in refusing to transfer the fund. They must, therefore, pay the costs occasioned by their paying the money into court, and their costs of the petition.

L.C.
1849.
Dec. 21, 22. }
1850. } HUNTER v. NOCKOLDS.
Feb. 19. }

Limitations, Statute of—3 & 4 Will. 4. c. 27. s. 42. and c. 42. s. 3, Construction of—Arrears of Annuity charged upon Land and secured by the Covenant of the Grantor.

The 3 & 4 Will. 4. c. 27. s. 42. takes away from an incumbrancer upon land, in all cases, the right of recovering as against the land more than six years' arrears of rent or interest; and the statute 3 & 4 Will. 4. c. 42. s. 3. merely restores the personal remedy against the debtor on the covenant.

An annuity and certain extra premiums for insuring the life of the grantor were charged upon land, and also secured by the covenant of the grantor:—Held, reversing the order of the Court below, that the annuitant was only entitled to recover against the land the arrears that had accrued due and the premiums paid by him within six years from the time of instituting proceedings to recover the same.

This was the petition of a subsequent incumbrancer, by way of appeal from an order of Vice Chancellor Wigram, who held, reversing the Master's finding, that an annuitant whose annuity was charged upon land and secured by a demise for a term of years, and by the covenant of the grantor to pay and by a judgment entered up, was entitled to recover as against the land the whole of the arrears of the annuity, and also all premiums of insurance made a charge upon the land which had respectively become due to, and been paid by the grantee within twenty years past. The case is reported in 18 *Law J. Rep. (N.S.)* Chanc. 407.

The question raised upon the hearing of the petition before the Court below, and on the present appeal was, whether the 3 & 4 Will. 4. c. 42. s. 3. operated as an exception out of the 42nd section of the 3 & 4 Will. 4. c. 27, so as to restore the remedy of the incumbrancer against the land for twenty years' arrears in the case of a covenant to pay, or whether the effect of c. 42. was merely to restore the personal liability upon the covenant.

NEW SERIES, XIX.—CHANC.

Mr. Humphry and Mr. G. Lake Russell, for the appeal petition.—The two statutes c. 27. and c. 42. relate to distinct subject-matters, the one to land, and the other to personal remedies. The object of the first statute was to relieve the land from more than six years of arrears; the object of the second was merely to restore the personal remedy. It is not a legitimate course of reasoning to say, that because the legislature has said that one remedy shall remain in force, both remedies are restored: especially, when such a construction would defeat the whole object of the first statute. The proper construction is to make the first statute give way only so far as may be necessary to give effect to the second.

Harrison v. Duignan, 2 Dr. & War. 295.

Henry v. Smith, Ibid. 381.

Hughes v. Kelley, 3 Ibid. 482.

Foley v. Dumas, 1 Smythe, 78.

They cited also—

Hodges v. the Croydon Canal Company, 3 Beav. 86.

James v. Salter, 3 Bing. N.C. 544; s. c. 6 *Law J. Rep. (N.S.)* C.P. 171.

Francis v. Grover, 5 Hare, 39; s. c. 15 *Law J. Rep. (N.S.)* Chanc. 99;

and they distinguished the case of *Du Vigier v. Lee* (1), as one where the right of subsequent incumbrancers was not affected by the decision.

The Solicitor General and Mr. Southgate, for the plaintiff, an incumbrancer in the same interest with the appellants.

Mr. Teed and Mr. Pryor, in support of the order below, contended, that the statute c. 42. restored the remedy against the land for twenty years' arrears where there was a covenant to pay by the grantor, and was intended to operate by way of exception out of the former act.

Paget v. Foley, 2 Bing. N.C. 679; s. c. 5 *Law J. Rep. (N.S.)* C.P. 258.

Strachan v. Thomas, 12 Ad. & E. 556; s. c. 9 *Law J. Rep. (N.S.)* Q.B. 397.

Du Vigier v. Lee.

Feb. 19.—THE LORD CHANCELLOR.—The only difficulty in this case is as to the operation of the Statute of Limitations, the 3 & 4 Will. 4. c. 27. and the 3 & 4 Will. 4. c. 42, on an annuity charged on

(1) 2 Hare, 326; s. c. 12 *Law J. Rep. (N.S.)* Chanc. 345.

land of the grantor, and also secured by his covenant. The question arises on the Master's report on a reference, a receiver having been appointed to inquire as to the title of the annuity, the priority of charges, and what was due. The Master having found arrears due beyond the six years, the question raised is, whether, under these circumstances, six years or twenty years should be the limitation of arrears for an annuity so secured. Vice Chancellor Wigram having in this, and in a former case of *Du Vigier v. Lee*, devoted the greatest attention to this subject, and having decided that twenty years was a period applicable to this case, it has been my duty to consider the grounds of his judgment, with reference to the statutes, and to the construction which has by other Courts been put upon them. The first act, the 3 & 4 Will. 4. c. 27, has no preamble, and the title cannot be resorted to in construing the enactments; but all the earlier provisions relate to limitation of actions and suits relating to real property, and the 40th section having made twenty years after the accrual of the right the period within which proceedings must be instituted to recover any sum of money charged upon or payable out of land, the 42nd section provides that no more than six years arrears of rent or interest in respect of any sum of money charged upon or payable out of any land or rent shall be recovered by way of distress, action, or suit. The object of the act being to relieve land from arrears of charges beyond the six years; but the enactment creating a bar to all actions and suits for money charged on or payable out of land, the question probably arose whether, in protecting the land, the act had not relieved the debtor from his personal liability, which formed no part of its object. If so, this must have been soon discovered, for by the act, cap. 42. of the same session, and passed only three weeks after the former act, by the 3rd section it is provided, that all actions of covenant or debt on any specialty shall be sued and brought within twenty years after the cause of such actions or suits, but not after. This provision does not profess to deal with the land on which any demand might be secured, but with a personal action only, and the former act professed to deal with the land only;

and, so considered, there would be no inconsistency between these provisions, the subject-matter of each being different. No question could have arisen but from the generality of the words "action or suit," in the 42nd section of the earlier act; but whether the provisions of the latter act, section 3, were framed without reference to the 42nd section of the earlier act, but intending to provide for a different subject-matter, namely, personal liability, and not the charges on land, or whether it was intended to limit the generality of the former provisions by confining them to what was the subject of the act, namely, the land, is not material. The provisions of the two must, if possible, be reconciled; which can only be done by construing the first act as applicable only to the land, and the latter as applicable only to the personalty. If, as by the order under review, the remedy against the land be to be considered as extending to twenty years in all cases in which there is also security of the personal covenants, the two acts would be wholly inconsistent, and the legislature must be supposed within three weeks, by the second act, to have repealed the first, in by far the greater part of the cases to which it would apply. In some of the cases which have arisen under the acts, the Courts have treated the provision of the second act as an exception out of the enactments of the former. The conjoint enactment would in that case be, that no more than six years' arrears of rent or interest in respect of any sum charged on or payable out of any land or rent shall be recovered by way of distress, action, or suit, other than and except an action on covenant or debt on specialty, in which case the limitation would be twenty years. This appears to me to be the only mode of reconciling the two enactments, and to have been the intention of the legislature. If, therefore, I had not had any guide but the enactments themselves, I should have put this construction upon them. But I am not without assistance on this point, for such has been the construction adopted by the Court of Common Pleas and the Court of Queen's Bench, in this country, and by Sir Edward Sugden as Chancellor of Ireland; not, indeed, a direct decision; but in all the cases it is sufficiently express-

and entitled under her father's will to considerable personal property. No settlement was executed upon the marriage; but, subsequently thereto, it was proposed and agreed that part of her property should be made over to her husband absolutely, and that the residue should be settled. This agreement was carried out by a deed of the 29th of May 1811, and made between Benjamin Gaffee and Hannah his wife of the one part, and certain trustees of the other part; and the provisions of that deed, after directing an investment of the fund, were, that the trustees "do and shall pay the interest, dividends and annual produce of the same trust monies, &c. to such persons and for such purposes as the said Hannah Gaffee shall, from time to time, by any writing under her hand direct or appoint, but not so as to dispose of the same by sale, mortgage, or charge, or otherwise, in the way of anticipation; and in default of such direction or appointment, into her own hands for her own separate use, notwithstanding her coverture, independently of the said Benjamin Gaffee, who is not to intermeddle therewith, neither is the same to be subject or liable to his debts, contracts or engagements; and the receipts of her the said Hannah Gaffee and of her appointees are hereby declared to be discharges for the same; and do and shall, from and after the decease of the said Hannah Gaffee, pay the interest, dividends and annual produce of the same trust monies and premises to, or permit the same to be received by the said Benjamin Gaffee and his assignees during his life; and after the decease of the survivor of them, the said Benjamin Gaffee and Hannah Gaffee, if there shall be issue of their bodies, any child or children," then to go to the children.

Benjamin Gaffee died, and there were several children of the marriage. Mrs. Gaffee afterwards intermarried with her present husband, Adam Browne; and, subsequently to that marriage, Mr. and Mrs. Browne joined in charging her interest in the trust property with several annuities. The trustees of the settlement of 1811 thereupon paid the trust fund into court under the Trustee Relief Act.

Hannah Browne then presented her petition for payment to her of the dividends

of the trust fund. The petition was posed by the persons claiming under annuity deeds.

The question raised by the petition whether the restraint upon anticipation extended to the second coverture.

In January 1849 the petition came for hearing, before Wigram, V.C.; his Honour held that, upon the construction of the settlement of 1811 direction to pay to the separate use of Hannah was clearly confined to the coverture; and that the prior direction to pay according to her appointment, without power of anticipation, must be construed as co-extensive with that, both directions being parts merely of the machinery by which a gift to the separate use of a married woman was made effectual; and that so, the case did not come within the rule established by *Tullett v. Armstrong*, and *Scarborough v. Borman* (2); and his Honour concluded by saying, that while having formed a very positive opinion that the limited was the necessary construction, he found three cases decided by the Vice Chancellor of England, *Knig Knight* (3), *Benson v. Benson* (4), *Br v. Hughes* (5), which he must overrule except he adopted the limited construction in this case, namely, that the power was against anticipation in the settlement of 1811 was confined to the then existing coverture.

The petition now came on for rehearing by way of appeal, before the Lord Chancellor.

Mr. Wood and Mr. Parsons, for the appellant, Mrs. Browne.—In *Broun Bamford* (6) the Court held that the restriction as to anticipation extended to the whole gift, as well to the separate use as to the power of appointment. Here,

(1) 4 Myl. & Cr. 390; s. c. 9 Law J. Rep. Chanc. 41.

(2) 4 Myl. & Cr. 377; s. c. 9 Law J. Rep. Chanc. 48.

(3) 6 Sim. 121; s. c. 3 Law J. Rep. (n.s.) 187.

(4) 6 Sim. 126; s. c. 4 Law J. Rep. (n.s.) 59, 273.

(5) 8 Sim. 149; s. c. 5 Law J. Rep. (n.s.) 355.

(6) 1 Phil. 620; s. c. 15 Law J. Rep. (n.s.) 361.

the Court will not cut down the generality of the restriction in the clause giving the power of appointment by the reference to the particular coverture contained in the subsequent clause. The two clauses are perfectly distinct and independent of each other. As the fund is not to go over until the death of the survivor of the husband and wife, the wife will take a life estate by implication.

The Solicitor General and *Mr. Bacon*, for the annuitants, contrà, contended that the cases of *Knight v. Knight*, *Benson v. Benson*, and *Bradley v. Hughes*, were conclusive as to construction of the limitations, the question being quite independent of the rule laid down in *Tullett v. Armstrong*. In *Brown v. Bamford* the restriction was in words extended to future coverture; but no such words were found in the present settlement.

Mr. Walker and *Mr. Blundell* appeared for the trustees.

Mr. Wood replied.

Feb. 26.—The LORD CHANCELLOR.—The question arises in this case upon the language of the settlement as to the interest of a married woman in the trust fund. The settlement, after directing investment, proceeds in these terms—[His Lordship here read the trusts of the income of the fund as set out above]. That coverture having ceased by the death of Benjamin Gaffee, his widow afterwards married a second husband, and the second husband and wife then join in assigning that property, and the question is, whether that assignment is good. Now Vice Chancellor Wigram in his judgment in this case did not give a decided opinion as to the construction of the settlement, but thought himself bound by the cases of *Knight v. Knight*, *Benson v. Benson*, and *Bradley v. Hughes*. It has been my duty to examine both the grounds upon which the Vice Chancellor's judgment proceeded. Now, first as to these three cases. The first was decided in 1834, the second in 1835, and the third in 1836. At those respective periods, the rule of this Court was supposed to be settled by the cases referred to before me in *Tullett v. Armstrong*, that a provision for separate use and against anticipation would be inoperative under the second marriage, and that, although a second mar-

riage had been contemplated and attempted to be provided for by the author of the trust, as in *Malcolm v. O'Callaghan* (7). Under such a supposed state of the law, these decisions, which I have referred to, were the necessary consequence; for, if the provision for the separate use and against anticipation could not be made operative in the case of a second marriage, it could not be material whether or not the parties had expressed such intention. But now, taking the rule to be as laid down in *Tullett v. Armstrong*, that these fetters will protect the property of the wife during the second coverture, nothing having been done by her while discover to remove them, the only question will be, whether the settlement is so framed as to include the period of the second coverture. It must be observed that of these cases so decided by the Vice Chancellor of England, in the first—*Knight v. Knight*—there was a distinct gift for life to the separate use, and without power of anticipation; but the Vice Chancellor, after referring to *Newton v. Reid* (8) and *Woodmeston v. Walker* (9), held that the restriction was only binding during the life of the first husband, not beyond it. So, in *Benson v. Benson*, there was a distinct estate for life; but the provision for separate use, and against anticipation, appeared to be applied to the existing coverture. *Bradley v. Hughes*, in its circumstances, much resembled the present case; there being no gift for life, except in the direction to pay to the separate use. The Vice Chancellor held the assignee of the second husband, under the Insolvent Act, entitled on the principle supposed to be established in *Woodmeston v. Walker* and *Brown v. Pocock* (10), namely, that property given to the separate use (these are the words of the Vice Chancellor) of a married woman would operate as a restriction during the coverture, but not afterwards, so that after the death of the first husband the trust was for her, and then the marital rights of the second husband intervened, and his assignee was entitled to the

(7) 5 Law J. Rep. (N.S.) Chanc. 137.

(8) 4 Sim. 141; s. c. 5 Law J. Rep. (N.S.) Chanc. 137, n.

(9) 2 Russ. & M. 197; s. c. 9 Law J. Rep. Chanc. 257.

(10) 2 Myl. & K. 174; s. c. 4 Law J. Rep. (N.S.) Chanc. 47.

annuity. These cases, therefore, proceeding upon a supposed rule of equity, which does not now exist, and it being now settled that a gift to the separate use, without power of anticipation, will operate on all the covertures of a woman, unless those provisions are destroyed while she is discovert, these cases cannot be considered applicable to this case, which must, therefore, depend on the construction to be put on the words used, namely, whether the provisions for the separate use, and against anticipation, are applicable to the whole of the life estate given, or only during the then existing coverture. And for this purpose the first observation that arises is, that there is no gift but in the direction to pay, and the direction is to pay upon the wife's appointment in writing, but not by way of anticipation, and in default of appointment into her own hands for her separate use. This provision, standing by itself, would give to the wife the security of the separate estate according to *Tullett v. Armstrong* and *Scarborough v. Borman*; but these words are added, "notwithstanding her coverture, independent of the said Benjamin Gaffee, who is not to intermeddle therewith, neither is the same to be liable to his debts, contracts or engagements, and the receipts of her, the said Hannah Gaffee, and of her appointees, are hereby declared to be discharges for the same." These latter words obviously apply to the then existing coverture; but the parties clearly intended that the wife should have an estate for life. The possibility of her surviving her husband does not appear to have been contemplated; but that would not of itself affect the construction of the first part of the gift, if that be sufficient to give her an estate for life. It is in the first place to be observed, that the words are inoperative so far as relates to the then existing coverture, for B. Gaffee and his creditors would have been effectually excluded by the earlier words, although here there had not been that expression. Can any higher effect be given to those latter words than to shew that the parties had contemplated only the existing coverture, and had no purpose present to their thoughts relative to any future coverture? If the absence of such thoughts would not of itself affect the construction of the gift, can these words have

that effect, as they only prove that such thoughts were absent from their minds? What the annuitants are claiming is the absolute life estate of the wife as having become the property of the husband by marriage, but of any such life estate there is no creation by the settlement; for, by that settlement the trustees are only authorized to pay the dividends as they shall accrue due without anticipation to the appointees of the wife or into her own hands. The husband and wife joining in the annuity deed cannot be an appointment under this power. The order of the Court appealed from directs the trustees to pay the dividends in a manner not authorized by the terms of the trust, but in direct opposition to them, the deeds being grants of anticipated interests, and the discharge for which payments cannot be given by the wife or her appointees. The construction adopted can only be supported on the supposition that, taking the whole of the provision together, the generality of the earlier parts of it is restricted and confined by the reference to Benjamin Gaffee and his debts to the then existing coverture; but if so, the whole provision must be so restricted: and in that case the direction to pay the dividends to the wife or her appointees must be read with the same restriction, the provision as to anticipation of the income being part of the direction to pay. So that, after the death of Benjamin Gaffee, the direction to the trustees to pay the dividends to the wife would cease. The construction contended for assumes that the words used mean an estate for life to the wife and during the life of the then husband, for her separate use and without anticipation; but I find no words giving any unqualified life estate. If the restriction forms part of the only sentence which gives any estate, and is in words made part of such gift, then the estate and the restriction must be commensurate. It being, however, clear that the wife surviving was to enjoy the income, the provision for the children being to take effect only from and after the decease of the husband and wife, the clause giving the income to the wife cannot be so restricted; and if it cannot be so restricted, the trust must be considered as a direction to pay the dividends to the wife for her life and her appointees without anticipation; and if such

had been the words used, the direction would have been operative during the second coverture, notwithstanding the inoperative reference to the first husband and his debts.

On the grounds, therefore, that in the present state of the authorities, the cases referred to as having been decided by the Vice Chancellor of England cannot be considered as regulating the decision of the case, and that, the true construction of the settlement being a gift for the separate use without anticipation to operate for the whole life of the donee, the second husband was bound by this provision, I decide that the assignment by the second husband and the wife was void.

The order, therefore, of the Court below must be reversed, and an order made according to the prayer of this petition: that the dividends arising from the fund in court be paid to the wife for her life. The costs of the trustees to be paid out of the dividends.

V.C. }
Feb. 7. } *In re WREY'S TRUST.*

Power, Execution of by Will.

Under a marriage settlement a power was given to the husband to appoint among children by his last will and testament "to be signed and published by him in the presence of three witnesses." The power was executed by will, and the "signature" of the testator was witnessed by three witnesses:—Held, that the will was signed and published in the presence of the witnesses, and was a good execution of the power.

This was the petition of certain persons claiming to be entitled to a fund appointed by the will of the Rev. Bouchier W. Wrey, under a power. The fund had been paid into court under the Trustee Act, for the purpose of having the question decided, whether the will was a due execution of the power.

The petition stated that in pursuance of an order, made on the application of the petitioners, the matter had been referred to the Master, who had made his report, and had thereby found, amongst other things, that, by an indenture dated the 25th of

November 1789, and made upon the marriage of the said Bouchier W. Wrey and Sophia Bethell, it was declared and agreed that the trustees of the settlement should stand possessed of and interested in a certain sum of 8,300*l.* 3 per cent. consols, which had been transferred to them immediately before the execution of the said indenture, upon trust, to pay the interest, dividends and annual produce thereof, to the said Bouchier W. Wrey during his life, and after his decease, in case his intended wife should survive him, upon trust, to pay the said dividends, &c., to his said intended wife, and after the decease of the survivor of them, the said husband and wife, in case there should be two or more children of the marriage upon trust to transfer and make over one moiety or half part of the said 8,300*l.* consols to, between, and among all and every or any of the said children, in such parts, shares, and proportions, at such ages, days, or times, and subject to such provisoes, conditions and limitations, as the said Bouchier W. Wrey, by any deed or deeds, instrument or instruments in writing, to be sealed and delivered by him, in the presence of and attested by two or more credible witnesses, or by his last will and testament, or any codicil or codicils to be signed and published by him in the presence of and attested by three or more credible witnesses, should direct or appoint; and for want of such direction or appointment, then upon trust to transfer the said moiety, or so much thereof concerning which no such direction or appointment should be made, to, between, or among all and every such children, share and share alike, the shares of sons to be paid upon their attaining twenty-one, and the shares of daughters at twenty-one or marriage. And the Master further found that the said Bouchier W. Wrey duly made and published his last will and testament in writing, being therein called Bouchier W. Wrey, but which was signed by him as Bouchier Wrey, in the presence of and attested by three credible witnesses, and bearing date the 2nd of October 1826, and he thereby gave all his real and personal estate and all property whatsoever over which he had any power of appointment or disposal unto his beloved wife, Sophia Wrey, during her life, and after her decease he gave the same unto his son, the petitioner, John

Wrey, and his four daughters, meaning the petitioners, Florence Wrey, Mary Ann Wrey, Elizabeth Wrey and Eleanor Wrey, all of whom were his children by the said Sophia Wrey, to be equally divided between them, and he thereby appointed his wife the sole executrix of that his will; and he found that the said Bouchier W. Wrey died on the 19th of August 1839, and his said will was duly proved by the said Sophia Wrey on the 27th of February 1840; and the Master found that the testator had nine children, all of whom were living, with the exception of George Wrey, who died in 1801 an infant, Caroline Sophia Wrey, who died an infant in 1809, and Edward Bouchier Wrey, who died in May 1840, intestate, but leaving two children who were still living; and he found that Sophia Wrey, the wife of the testator, died on the 1st of October 1848 intestate.

The question now argued was, whether the will of Bouchier W. Wrey, whose signature alone was stated to have been witnessed, was to be considered as having been signed and published by him according to the words of the power.

Mr. Bethell and *Mr. Willcock* appeared for the petitioners.

Mr. Stuart and *Mr. Roupell*, *Mr. Rolé* and *Mr. Daniel*, *Mr. Lewin* and *Mr. Amphlett* appeared for other parties.

Cases cited—

Wright v. Wakeford, 17 Ves. 454.

Stanhope v. Kier, 2 Sim. & S. 37; s. c. 2 Law J. Rep. Chanc. 166.

White v. the Trustees of the British Museum, 6 Bing. 310.

Doe v. Burdett, 9 Ad. & E. 936.

Burdett v. Doe, 10 Cl. & F. 340.

The VICE CHANCELLOR.—In this case two questions were raised: one upon the execution of a power which was given to Mr. Wrey by his marriage settlement. The Master's report found the facts and the will and settlement,—by which it appeared that the former clearly authorized the donee to make a selection of any number of children. It appears that the will of the party executing the power was in these terms: "This is the last will and testament of me, the Rev. Bouchier Wrey. I give all my real and personal estate, and all property whatsoever over which I have any power of

appointment or disposal, unto my beloved wife during her life, and after her decease I give the same unto my son, the Rev. John Wrey, and my four daughters, to be equally divided between them; and I appoint my wife my sole executrix of this my will; witness my hand this 2nd day of October, 1826. B. William Wrey. Witnesses, W. Law, J. H. Toller, T. H. Law." Now the power was to be exercised by will, and to be signed and published in the presence of and attested by three or more credible witnesses; and it is found as a fact that the party duly made and published his last will and testament in writing, being therein called "Bouchier Wrey," but which was signed by him as "Bouchier William Wrey" in the presence of and attested by three credible witnesses. I cannot see what solid objection can be made to this execution of the power. I observe that the case of *Stanhope v. Kier* raised a doubt whether the will was duly attested; but it appeared to me, when I referred to that case, a remarkable thing that a doubt should be raised on the attestation of the will, when the mere fact that the will was handed to the witnesses by the testatrix was of itself evidence that they attested the publication. I also referred to the case of *Wright v. Wakeford*, in which though Lord Eldon seemed to throw a doubt upon the proper execution, yet according to my note I find it was sent to the Common Pleas, where Lord Mansfield thought it a good execution, although the other three Judges thought it bad. It appears to me that this case is free from that difficulty, and I must take it to be as the Master has found it, a proper execution of the power by a party who had a power of selection, and thereby the testator has effectually given a moiety of the settled fund.

The VICE CHANCELLOR then decided the second point raised in the case, which was as to the construction of certain words in the settlement in reference to the second moiety of the sum of 8,800*l.* consols, for which purpose his Honour said that he had been obliged to read through the whole instrument in order to gain any meaning to it, but no general principle whatever was involved in the decision.

L.C.	}	STILES v. GUY.
1848.		
Nov. 10, 11.		
1849.		
Nov. 12.		

Executors—Devastavit—Duties and Liabilities of Co-executors—Non-feasance.

Executors by proving the will take upon themselves the obligation of seeing that the assets are got in and properly invested; and it is the duty of each to watch over, and, if necessary, to correct the conduct of the other; and therefore it is no ground of immunity to an executor that he has been passive in permitting a debt due from his co-executor to the testator's estate, or a balance in his hands, to remain outstanding or uninvested, whereby the same has been eventually lost.

Two of three executors who had allowed their co-executor to retain in his hands for a period of six years a sum of money due by him to the testator, and which was afterwards lost to the estate by the bankruptcy of such co-executor, were held liable to make good that sum to the estate.

A direction in a will that executors shall call in securities not approved by them will not authorize a continuance of that kind of investment which a court of equity would not sanction.

This cause was heard originally, by Lord Lyndhurst, in the Exchequer in Equity, in 1832, and is reported in 4 *You. & Coll. App.* 571.

John Tuckey, by his will, devised and bequeathed all his real and personal estate to the defendants, Anthony Guy, Richard Tuckey his nephew and Richard Tuckey his son (whom he also appointed his executors), upon trust, as soon as conveniently might be after his decease, to realize the same, and to call for, receive, and get in all such part or parts thereof as consisted of book debts or securities for money not approved by them; and to apply the proceeds upon certain trusts in which the plaintiffs were interested. The will contained a proviso, that the trustees should not be answerable for any more of the trust monies than they should respectively receive, but each for his own acts, receipts, and wilful defaults only, nor for involuntary losses. The testator died in September 1823, and the will was

proved by the three executors. The principal management and controul of the trust estate was left by the other executors in the hands of the defendant Guy, who had been the testator's solicitor, and who, at the time of the testator's death, was indebted to him in the sum of 12,000*l.* and upwards.

The defendants, Tuckey, had allowed their co-trustee, Guy, to retain this money in his hands for nearly six years after the testator's death, when the plaintiff, who was one of the parties interested under the will, filed her bill in March 1829 against the three trustees, and the other *cestuis que trust*, for the administration of the testator's estate. The defendant Guy, shortly after putting in his answer, became bankrupt. Upon the hearing, it was held that the defendants Tuckey, having allowed the 12,000*l.* to remain so long in the hands of their co-trustee, were liable to make good to the trust estate the loss sustained in consequence of the bankruptcy of Guy; but an inquiry was directed, whether, if the defendants Tuckey had taken measures to call in the debt due from Guy to the testator, it might or could have been recovered.

In June 1848 the cause came on before the Vice Chancellor of England upon further directions, when, it appearing that the defendants Tuckey had taken no steps to prosecute the inquiry directed by the decree, an order was made against the two executors, Tuckey, to pay the sum of 12,981*l.* 5*s.* 4*d.* into court, with interest at 4*l.* per cent. from the time of the testator's death.

The defendant Richard Tuckey, the son, and the representatives of Richard Tuckey the nephew, deceased, now appealed from that decree.

Mr. Stuart, Mr. James Parker, and Mr. Heathfield, appeared for the appellants, and

Mr. Bethell, Mr. Roll, Mr. Pitman, Mr. Bevir and Sir W. Riddell, for other parties.

Nov. 12, 1849.—THE LORD CHANCELLOR.
—The testator in this case had been accustomed for many years, and up to the time of his death, to employ Anthony Guy, a solicitor, not only in his professional capacity, but as agent in the management of his pecuniary affairs much in the cha-

racter of a banker. He left large sums of money in his hands, not as incidental to his employment of a solicitor and agent, but upon loan at interest without security, and simply upon his notes or accountable receipts; and the whole balance at the time of the testator's death amounted, as the Master's report finds, to 12,981*l.* 5*s.* 4*d.* The testator appointed this Anthony Guy and Richard Tuckey the younger, the testator's nephew, and Richard Tuckey, one of his sons, executors and trustees of his will. The will does not take any notice of the connexion with Anthony Guy or of the debt due from him; but it directs the executors, as soon as conveniently may be after the testator's decease, to sell and convert into money all such parts of his property as should not consist of monies or securities for money, and to call for, receive, and get in all such part or parts thereof as consisted of book debts or securities for money not approved of by them; and after directing them to retain 50*l.* each, as a small compensation for their trouble, and directing the payment of his debts, he gave one-seventh part of the residue to his son Richard, and directed his executors to place out and invest the remaining six-sevenths in or upon any of the parliamentary stocks or funds, or in real securities in England; and one of those six-sevenths he gave to each of his children and their families. The particulars of those gifts are not material, inasmuch as infants are interested in all those shares; and that circumstance, so far as the capital is concerned, excludes all question as to acquiescence, on the part of the *cestuis que trust* of the capital, in the *devastavit* for which compensation is sought in this suit. He directed that all advances made by him to any of his children should be taken as part of their shares.

The testator died in September 1823. All the three executors proved, but Anthony Guy appears to have principally acted in the trusts of the will. The correspondence shews that no one of the family interested under the will, nor either of the executors, was acquainted with the state of Anthony Guy's account with the testator's estate; but that he had large funds belonging to that estate in his hands must have been known, several of the tenants for life

applying to him for, and receiving from him, payments on account of what was coming to them, and he having, in December 1825, paid Richard Tuckey the sum of 3,200*l.*

The family soon became impatient at their not being able to ascertain the state of the testator's property, but do not appear to have entertained any suspicion of the solvency of Anthony Guy. The letters shew that Richard Tuckey, the son, so early as the 8th of December 1824, and Richard Tuckey the younger, so early as the 11th of September 1825, applied to Anthony Guy, and pressed him for a settlement of the testator's affairs. Applications for this purpose were often repeated by the co-executors and by different members of the family, but were always evaded by Anthony Guy, until the original bill in these causes was filed in March 1829, by Joanna Stiles, one of the testator's daughters, and her children. On the 23rd of July 1829, an order was made, upon Anthony Guy's answer, for payment into court by him of 6,100*l.*, on account of the testator's estate, on or before the 6th of November; and this time was afterwards, without the knowledge of the co-executors, enlarged by an order of the 12th of November 1829 to the 18th of January 1830. But on the 22nd of November 1829, Anthony Guy, being insolvent, absconded, and was afterwards declared a bankrupt; and in November 1830 a supplemental bill was filed, stating the case against his co-executors, Richard Tuckey the nephew and Richard Tuckey the son.

By the original decree of the Exchequer, in December 1832, the usual accounts were directed to be taken, and it was referred to the Master to inquire, first, whether any of the adult parties had acquiesced in the debt due from Anthony Guy to the testator at the time of his death, not being called in; secondly, whether, if Richard Tuckey the younger and Richard Tuckey the son had taken measures to call in the debt, it might or could have been recovered; and, thirdly, whether the enlargement of the time for paying the 6,100*l.* into court had been ordered without the knowledge or consent of Richard Tuckey the younger and Richard Tuckey the son, and whether, if such enlargement had not taken place, the money might could have been recovered?

The first inquiry the Master answered in the negative, finding that none of the adult parties acquiesced in the debt due from Anthony Guy to the testator at the time of his death not being called in. This was the only part of the Master's findings disputed by exceptions, which asserted the affirmative. These exceptions the Vice Chancellor overruled, and, I think, most properly. The acquiescence to be inquired into could only consist of what would be tantamount to an approval of the debt due from Anthony Guy remaining in his hands; whereas the evidence and correspondence prove that all parties were kept in ignorance as to the state of the account between Guy and the estate, and that all were anxious and earnestly pressed for a statement and settlement of the account. It is true that it appears that the parties were aware that large sums were in his hands, and that they received, on account of their life income, various sums of money from Anthony Guy, and to this extent the defendants, the other executors, are entitled to the benefit of such fact; but that is very far from establishing the affirmative of the inquiry. The appeal, therefore, so far as it complains of the judgment upon the exceptions, must be dismissed.

As to the second inquiry, the Master finds that no party had brought any statement before him, although he had, at the instance of the plaintiff, called upon the defendants to prosecute the same; and as to the third inquiry, he finds that the time for paying in the 6,100*l.* was made without the knowledge or consent of the co-executors; but that if no such enlargement had taken place, the money could not, after the 6th of November 1829, have been recovered from Guy.

These causes having come before the Vice Chancellor of England upon exceptions and further directions, his Honour, by an order of the 3rd of June 1848, after overruling the exceptions, declared that the appellants, Thomas Tuckey and Elizabeth Rhodes, the representatives of the late defendant, Richard Tuckey, the younger, and the defendant, Richard Tuckey, the son, ought to be charged with the sum of 12,981*l.* 5*s.* 4*d.*, the amount found by the Master to be due from Anthony Guy to the testator, at the time of his death, and they

were ordered to pay the same into court; and that they ought to be charged with interest upon the same, at 4*l.* per cent., from the testator's death to the time of payment; and it appearing that various sums of money had been paid by Anthony Guy to the legatees for life, the Master was directed to inquire and state what was due to or from each party in respect of his legacy and interest, having regard to the advances made, and when, and by whom, and under what circumstances the same were made, and what was due to the tenants for life, after deducting the sums already received by them. The report found that, upon the executorship account, A. Guy had received 11,387*l.* 7*s.* 7*d.*, and had paid, including payments to the legatees, 6,746*l.* 17*s.* 8*d.*, leaving a large balance due from him upon that account; but the decree does not charge the co-executors with such balance.

The question upon this appeal is, whether the decree is right in charging the co-executors with what was due from Anthony Guy at the time of the testator's death, as his solicitor or agent, with interest from that time to the time of payment. The solution of this question must, I think, depend upon general principles, and not upon any particular circumstances of this case. The direction in the will, that the executors should call in securities not approved by them, must be considered as referable to securities upon which a testator's property might, from their nature, be invested, and not as authorizing a kind of investment which a court of equity could not sanction. So, the confidence which the testator reposed in Anthony Guy, and the manner in which he intrusted property to his keeping, cannot be considered as furnishing a rule for a similar mode of dealing with him by the other executors; and evidence of the testator's intention in this respect cannot be attended to; and the knowledge of some of the adult legatees of Anthony Guy's dealings with the estate, which, though not amounting to acquiescence, may be of importance when the claims of each legatee come to be considered, can have no effect upon the question of securing the capital in which infants are interested as well as themselves. I think, therefore, that the general question is raised, how far executors are liable for a debt which was

due from their co-executor at the time of their testator's death, which was lost by his insolvency many years afterwards (in the present case six years), and to compel payment of which no suit was instituted until within eight months of the declared insolvency, although frequent applications had from time to time been made for a settlement of the accounts. Looking to the rules applicable to this subject, which appear to have been recognized and acted upon at the commencement of the present century, there would appear to be much difficulty in the solution of this question. It was well established that an executor proving a will, but not further acting, might incur a liability to make good losses arising from his negligence, such as the loss of debts outstanding upon improper security, or from the Statute of Limitations having been permitted to run upon them. But it was also well established, and assumed by the highest authority, that a *devastavit* by one of two executors would not charge his companion, provided he had not contributed to it. In *Hovey v. Blakeman* (1), which was in 1799, Lord Alvanley says—"It is very clear an executor may join in the probate with his co-executor, and does not by that, and by permitting the other executor to possess assets, make himself answerable for the receipts of the other: he is only answerable by permitting his co-executor to avail himself of the power every executor has of coming at the assets, and concurring himself in the application of them." In *Lord Shipbrook v. Lord Hinchinbrook* (2), which was in the year 1805, Lord Eldon puts a case involving this principle, and says that he is "not sure there would be a principle for charging the executors;" and in *Langford v. Gascoyne* (3) Lord Eldon says—"The rule in all the cases is, that, if an executor does any act by which money gets into the possession of another executor, the former is equally answerable with the other: not, where an executor is merely passive, by not obstructing the other in receiving it. But if the one contributes in any way to enable the other to obtain possession, he is answerable, unless he can assign a sufficient excuse." In the reported cases, the loss

appears to have been of property received by the defaulting executor after the testator's death, and not of a debt due from him before that event; but this cannot furnish any distinction against the co-executor. In the latter case, a debt due from an executor constitutes part of the assets, but the co-executor could not have had any controul over it, whereas he had the means of watching and, if necessary, of interfering with the receipt by the defaulting executor of assets, after the death. His being passive cannot be an immunity for him in the case of assets received, and not in the case of a debt retained; but how is this immunity consistent with the admitted liability of all executors for losses from negligence and inactivity in not calling in debts due to the estate? Could passiveness be a protection in the case of property lost, in the hands of a co-executor, but an offence in the case of property lost in the hands of other debtors to the estate? The liability in the latter case arises from the soundest principle. If a person named executor does not choose to accept the office, he has only to renounce, or at least to abstain from proving. But if he proves, he thereby accepts the office and becomes bound to perform the duties of it, and is liable for the consequences of his neglecting to perform them. Of these duties, a principal one is to call in and collect such parts of the estate as are not in a proper state of investment. If he knows, or has means of knowing, that part of the estate is not in a proper state of investment, but is held upon personal security only, and not necessarily so for the purposes of the will, is it not part of the duty which he has undertaken, to interfere and to take measures if necessary for putting such property in a proper state of investment; or is it no part of his duty because the property is in the hands of a co-executor, and not of any stranger to the estate? It is impossible to find any principle for any such distinction, and so it appears to have been felt when the case arose, as it did in *Mucklow v. Fuller* (4), before Lord Eldon in 1821, in which Sir John Leach, as Vice Chancellor, and Lord Eldon upon appeal, held Fuller, an executor who had proved, but had not acted, liable for a bond debt due from the other

(1) 4 Ves. 607.

(2) 11 Ibid. 254.

(3) Ibid. 335.

(4) Jac. 198.

executor, Mucklow, before the testator's death, which had remained unpaid and was lost by his insolvency. It is true that in that case there was a specific bequest of the bond debt, which the will directed the executors to get in and place upon government securities within three years, and to hold upon certain trusts: and this was relied upon in argument and not disregarded in the judgment, a distinction appearing to be relied upon between the office of executor and trustee: but it does not appear to me that these circumstances prevent that case from involving the principle which must regulate the present. There cannot be one rule applicable to a portion of the estate given to the executors upon particular trusts, and another rule applicable to another portion of the estate constituting the residue given to the executors for the general purposes of the will. In both cases the executors are trustees of the funds which they are to administer, for the purposes specified; and their responsibility with respect to each of such funds must be the same. In *Booth v. Booth* (5) the question arose before Lord Langdale, and he held the passive co-executor liable for property of the testator improperly left in the hands of the acting executor. *Lincoln v. Wright* (6), before the same learned Judge, was not a case of a debt due from a party who was appointed executor, but of assets received by one of three executors and lost, and the others were held liable, not upon the ground of the defaulting trustee having through any act of theirs obtained possession of the property, but upon the simple fact of their having permitted the breach of trust, that is, their not having taken effectual measures to correct it and secure the property.

From what I have already said, it will have been seen that I approve of the principle of these decisions, and that I cannot discover any principle for distinguishing between losses by not calling in debts due from debtors to the estate and balances due from executors. These cases establish that it is the duty of all executors to watch

over, and, if necessary, to correct the conduct of each other; and the moment that principle is established, all ground of distinction between the two classes of cases ceases. Finding, therefore, a principle adopted and acted upon for many years and in many decisions, of the justice and grounds of which I fully approve, I cannot feel any disposition to shake its authority, because I cannot reconcile it with *dicta* and doctrines of a much earlier date respecting the security of an executor who is passive. I have discussed this case much more at large than any difficulty in it would seem to warrant, because I thought it material to draw the attention of those who may hold the office of executors, that they cannot safely rely upon what they may find in the earlier cases, laying it down that a *devastavit* by one of two executors shall not charge his companion, provided he has not intentionally or otherwise contributed to it. The later authorities to which I have referred must shew them that passiveness will in many cases furnish no protection, but that negligence and inattention in not interfering with and taking proper measures to prevent or correct the improper conduct of their co-executors, may subject them to responsibilities from which the language of the earlier cases might lead them to suppose they were exempt. The co-executors appear in this case to be free from any moral blame: they derived no benefit, but have suffered much from the breach of trust of Anthony Guy; but they knew that part of the testator's property remained in his hands, and that it was, therefore, not in a proper state of investment. They knew, therefore, that a breach of trust by him was actually in operation; and excepting some unprofitable applications for accounts and a settlement, nothing was done by them to secure the property so known to them to be in peril.

I am, therefore, of opinion that they have been properly made liable to make good the loss: and the decree is, I think, right as to interest. What A. Guy paid, including payments to the family, appears to have been much less than what he received as executor, independently of the debt due from him at the testator's death. If the defendants have any remedy against the

(5) 1 Beav. 125; s. c. 8 Law J. Rep. (N.S.) Chanc. 39.

(6) 4 Beav. 427; s. c. 10 Law J. Rep. (N.S.) Chanc. 331.

shares of any of the legatees, the time to consider it will be after the report upon the reference. The appeal must, therefore, be dismissed, with costs.

V.C. }
Feb. 1. } STEVENS v. WILDY.

Copyright—Piracy—Injunction.

The bill stated that one of the plaintiffs had composed a book, and that all the plaintiffs had caused the book to be printed and published for their joint benefit, and the said book had been duly registered by the plaintiffs as proprietors of the copyright thereof at Stationers' Hall, and the copyright had ever since remained in the plaintiffs, for their joint benefit. The bill also alleged that the defendants had published a book, in which numerous passages were copied from the plaintiffs' book, and it prayed an injunction to restrain the sale of the defendants' book. Held, upon motion for the injunction, that under the Copyright Act, 5 & 6 Vict. c. 45, the plaintiffs had a joint right to sue.

Held, also, upon comparison of the two books, that in the defendants' book there had been such copying from the plaintiffs' book, as would entitle them to the injunction.

The plaintiffs in this case were Valentine Stevens, Richard Stevens, and George Norton, booksellers and publishers, and John Malcolm Ludlow, a barrister-at-law, and the defendants were Mary Wildy, Charles Wildy, and James Wildy, booksellers and publishers, and Edward Bourne Lovell, a barrister-at-law.

This bill stated that, in the year 1848, John Malcolm Ludlow composed and wrote a certain book, in one volume, entitled "The Joint-Stock Companies Winding-up Act, 1848, with an Introduction, Notes, and Forms," and the plaintiffs caused the same to be printed, and they published the same on the 1st of December 1848, for their joint benefit; and the plaintiffs had been duly registered as the proprietors of the copyright of the said book at Stationers' Hall, in pursuance of the provisions of the statute in that case

made and provided, and the said copyright had ever since remained and now was vested in the plaintiffs, for their joint benefit; that afterwards, in the year 1849, the plaintiff, J. M. Ludlow, composed and wrote a supplement to the said book, and the plaintiffs caused the same to be printed, and they published the same on the 6th of December 1849, for their joint benefit, and they also on the same day published the said two books, bound up together, with a consolidated index to the two; that the defendants had lately, and since the said book so first published by the plaintiffs was printed and published, caused a certain book to be printed and published, in one volume, entitled, "The Joint-Stock Companies Winding-up Act, 1848-1849, with Notes and Acts of Parliament having reference to these Acts, the various Cases decided under the Act of 1848, together with Forms and Precedents adapted to Practice, and Directions as to the course to be adopted in the Master's Office," by Edward Bourne Lovell, barrister-at-law; that the said defendants first published their book in December 1849; that the defendants alleged the last-mentioned book was composed and written by the said E. B. Lovell as an original book, and without copying from or making use of the said book published by the plaintiffs; but that the said book so published by the defendants was, in a great measure, a copy of the book published by the plaintiffs, and that many of the passages therein were word for word the same as several of the passages in the plaintiffs' said book, and other parts thereof were mere colourable alterations of divers parts of the plaintiffs' book, and that, although some passages in the defendants' book were therein acknowledged to have been taken from the plaintiffs' book, yet the greater number of the passages taken *verbatim* from the plaintiffs' book, or in which colourable alterations only were made, were not in any manner acknowledged; and that the defendants' book was published without the consent of the plaintiffs; that the plaintiffs represented to the defendants the injury which would accrue to them from the sale of Mr. Lovell's book, and requested the same might be stopped; that various communications then took place between the

plaintiffs and the defendants, which ended in the defendants having reprinted one page only of their work, which they admitted to have been incautiously adopted from the plaintiffs' work without acknowledgment, but that the defendants refused to admit that any other portions of their work were improperly copied from the plaintiffs' book. The bill prayed that the defendants might be restrained by injunction from selling or otherwise disposing of any copies or copy of the said book so published by them; and that an account might be taken of the profits which the defendants had made by the sale of their book; and that the defendants might be decreed to deliver up to the plaintiffs, to be cancelled, all copies of the said book remaining in their possession.

Mr. Bethell and *Mr. Glasse* now moved for an injunction according to the prayer, and quoted various passages from the two books, to prove the allegations in the bill.

Mr. Roll and *Mr. Craig*, on behalf of the defendants, in the first place raised an objection to the plaintiffs' title. The bill alleged that *Mr. Ludlow* had composed the book, and the plaintiffs had caused the same to be printed, and they had published the same on the 1st of December 1848 for their joint benefit, and the plaintiffs had been duly registered as the proprietors of the copyright, at Stationers' Hall. Now, by the 3rd section of the Copyright Act, 5 & 6 Vict. c. 45, the copyright was declared to be the property of the author and his assigns. By the 2nd section it appeared that the word "assigns" meant every person in whom the interest of an author in copyright should be vested, whether derived from such author before or after the publication of any book, and whether acquired by sale, gift, bequest, or by operation of law, or otherwise. By the 11th section it was provided that a book of registry should be kept at Stationers' Hall, wherein might be registered the proprietorship in copyright of books or assignments. The 13th section provided that the proprietor of a copyright might make entry in the registry book of the time of the publication, &c. according to the form in the schedule to the act, and that it should be lawful for such registered proprietor to assign his interest by making entry in the said book of such assignment,

and name and place of abode of the assignee; such assignment to be effectual in law without stamp, and of the same force as if assignment was made by deed. It could never have been the intention, under this act, that the interest of an author should be passed without a deed or instrument in writing, and no such instrument had been made in this case, nor was there any registry of an assignment from the author to the other plaintiffs. Then it appeared that the registry was only effected on the 11th of January last, and the plaintiffs did not allege that on the 5th of December 1849, when the defendants' book was published, the copyright was in them, or that they were the assignees of *Mr. Ludlow*. All they alleged was, that they published for their joint benefit, and that they had a beneficial interest in the publication. This might be true; but still the legal interest in the copyright would remain in *Mr. Ludlow*, who could alone have any right to sue. For instance, the agreement made between *Mr. Ludlow* and the other plaintiffs, when the book was first published, might have been that *Messrs. Stevens & Norton* should print 1,000 copies, pay all the expenses of publication, and they and *Mr. Ludlow* should share the profits. *Messrs. Stevens & Norton* would thus have an interest in the 1,000 copies, all of which might have been sold and their interest have ceased, but the copyright would remain in *Mr. Ludlow*. At all events, there was no allegation that *Messrs. Stevens & Norton* had any title to the copyright before the 11th of January last, which was after the alleged piracy. As to the resemblance between the two books, it was contended that it was evident upon comparison there were no passages in the defendants' book which could be considered as improperly or unfairly taken from that of the plaintiffs. When two persons were writing upon the same subject, and that a single act of parliament, the cases cited by each and the order in which those cases would arise (being the dates when they were decided) would naturally lead to some similarity in the language of the two books; each would, to some extent, adopt the language of the case he was citing; thus many of the words used by *Mr. Ludlow* were to be found in the reports of cases to which he

referred. Mr. Lovell had gone to the same source, and had naturally used some of such words in the same order as Mr. Ludlow. There were some cases cited on a particular branch of the subject in both books in nearly the same order, but it would be found, from certain trivial alterations and omissions, that Mr. Ludlow had taken his list of authorities from a case in Mr. Hare's Reports, and Mr. Lovell had taken his from a report of the same case in the *Law Journal Reports*. Various passages were pointed out to prove this argument; and it was contended that the defendants' work was, in many cases, so dissimilar, and the arrangement of matter was altogether so different from the plaintiffs' book, that no injunction ought to be granted. *Bramwell v. Halcomb* (1) and *Spottiswoode v. Clarke* (2) were cited on the question of unfair copying.

The VICE CHANCELLOR.—This appears to me a plain case. There are two objections made to the injunction asked: the first is, that on the allegations found in this bill the Court is not bound to take it that the copyright is in the plaintiffs. Now, it is obvious that by the 11th section of the Copyright Act, 5 & 6 Vict. c. 45, there is a positive direction that there shall be a registry of books for the purpose of proving to whom the copyright belongs, and it is enacted that certified copies of such registry shall be received in evidence in all courts, and in all summary proceedings, and shall be *prima facie* proof of the proprietorship or assignment of copyright. Then, when you look to the thing stated in the schedule to the act as the form of registry, you find that which corresponds exactly with the thing which has been handed up to the Court as the copy of the registry in this case. Then the 13th section of the act enacts, that it shall be lawful for the proprietor of copyright in any book, to make entry in the registry book of the title of such book; and that it shall be lawful for every such registered proprietor to assign his interest, or any portion of his interest therein, by making entry in the said book of registry of such assignment;

and such assignment so entered shall be effectual in law, and shall be of the same force and effect as if such assignment had been made by deed. And by the 24th section it is enacted, that no proprietor of copyright in any book which shall be first published after the passing of the act shall maintain any action or suit, at law or in equity, or any summary proceeding, in respect of any infringement of such copyright, unless he shall, before commencing such action, suit or proceeding, have caused an entry to be made in the book of registry of the Stationers' Company, of such book, pursuant to the act. This bill represents that one of the plaintiffs, John Malcolm Ludlow, composed a certain book, and the plaintiffs caused the same to be printed, and they published the same on the 1st of December 1848 for their joint benefit; and that the plaintiffs had been duly registered as the proprietors of the copyright of the said book at Stationers' Hall, in pursuance of the provisions of the statute, and the said copyright had ever since remained and now was vested in the plaintiffs for their benefit. Is it not, therefore, obvious that prior to any assignment, it is competent for the author of a book to make such entry with regard to himself and others as he chooses? The act states that there shall be such entry made according to the statute before anything is done by those who claim an interest in the copyright. When my attention was drawn to the act by the defendants' counsel, I thought it would be a most absurd construction of the act to say that, because a person had been the writer of a book in the first instance, no person should have a right to take any interest in the book except by executing a deed of assignment of it. My opinion is, that the author might associate with himself, by registry under the act, any person he pleases. On the bill as it stands, I think, therefore, that the plaintiffs have a good right to sue.

On the second question, as to the infringement of the copyright, I think it is impossible to take up these two books and not see that there has been a very copious taking by the defendant Mr. Lovell from the book written by Mr. Ludlow. I do not wish to speak harshly of the nature of the defendants' work; but I cannot help

(1) 3 M. & Cr. 737.

(2) 2 Ph. 164.

saying that his book appears, in a great degree, to have been completed by taking, in many instances, the actual words as they stand in the plaintiffs' work. I do not think that I am bound to go through the whole book; but I apprehend that the law at present is in conformity with the old Roman law, which is, that if the defendant will take the plaintiff's corn and mix it with his own, the whole should be taken to be the plaintiff's; and after the defendants in this case have taken so much as I see has been taken, I think the injunction ought to be granted.

L.C. } THE LONDON AND NORTH-
1849. } WESTERN RAILWAY COM-
May 5, 8. } PANY v. SMITH.

Railway Company—Lands Clauses Consolidation Act, 1845, 68th section—Compensation—Title of Claimant Doubtful—Injunction.

A railway company in prosecuting their works within the powers of their act, carried their line across a street by a solid embankment, by means of which the access from one part of the street to the other was totally interrupted. The owner of houses, &c. in this street, which were situate 126 feet from the boundary line of the railway, served the company with a notice, under the 68th section of the Lands Clauses Consolidation Act, 1845, of a claim for compensation, on the ground of his premises being injuriously affected by the works of the company, and requiring them to summon a jury to settle the compensation in case they declined to pay the amount claimed. On a bill filed by the company against the claimant, denying his right to compensation, the Court granted an injunction to restrain the defendant from proceeding upon his notice, or taking any other steps to recover the amount claimed by him; but gave him liberty to bring an action against the company, and directed that the company in such action should admit the notice of claim within the terms of the 68th section, and that the company had not taken proceedings to summon a jury within the time prescribed by that section; and that either party should be at liberty to apply after trial, the parties undertaking to use the judgment as the Court should direct.

NEW SERIES, XIX.—CHANC.

The London and North-Western Railway Company were empowered under their act (9 & 10 Vict. c. ccclix.) to carry their railway across Bartholomew Street, Birmingham, by means of a solid embankment, by which the access to the two parts of the street was altogether interrupted. The defendant was interested in certain premises in Bartholomew Street, situate at about 126 feet distant from the boundary line of the railway where it intersected the street, but no part of such premises was numbered on the deposited plans referred to in the act, or was mentioned in the book of reference.

On the 1st of March 1849, the defendant, under the 68th section of the Lands Clauses Consolidation Act, 1845, (8 Vict. c. 18.) served the company with notice that he claimed a sum of 2,000*l.* by way of compensation for damages sustained by him in respect of his premises in Bartholomew Street, and requiring the company to pay him that amount, or to summon a jury for settling the amount due to him for such compensation. The company thereupon filed their bill against the defendant, praying a declaration that the defendant was not entitled to any compensation in respect of his premises; and that, if necessary, an issue might be directed to try, or that it might be ascertained under the direction of the Court, whether the premises of the defendant had been "injuriously affected," within the meaning of the 6th section of the Railways Clauses Consolidation Act, (8 Vict. c. 20.) by the construction of the company's works; and that the defendant might be restrained from taking any proceedings against the plaintiffs under the notice of the 1st of March 1849, and from taking any proceedings at law to recover the sum of 2,000*l.* claimed as such compensation.

The bill charged that no damage was done by the company's works to the defendant's premises, and that there was no provision under any act of parliament by which it could be determined whether the defendant was entitled at law to any compensation, and that such question could not be determined without the aid of a court of equity.

On the 26th of April 1849 the plaintiffs moved before the Vice Chancellor of England for an injunction in the terms of the

prayer of the bill, when his Honour declined to make the order. This motion was now renewed, by way of appeal, before the Lord Chancellor.

Mr. Bethell and *Mr. Speed*, for the motion.—The plaintiffs in this case, under the provisions of the 68th section of the Lands Clauses Consolidation Act, must, within a specified time, summon a jury to assess the damages, or they will be liable to pay the whole amount claimed. But by summoning a jury under this section, the company will admit that the defendant is entitled to some compensation. The preliminary question here is, whether the defendant is entitled to any compensation; and the jury, if summoned, would have no power to determine that question. The case of *The South-Western Railway Company v. Coward* (1) raised a similar question, and there this Court supported the injunction.

Mr. Malins, *Mr. Metcalfe*, and *Mr. Phipson*, contra.—The course adopted by the defendant to try his right is the proper course; for the jury might find no damage—*The Queen v. the Lancaster and Preston Junction Railway Company* (2); if the jury find there is damage, the defendant's right to such damage may then be tried in an action at law. The defendant was bound to proceed in the mode pointed out by the act—*Thicknesse v. the Lancaster Canal Company* (3), and this Court will not interfere with a legal remedy unless the facts raise a ground of equity—*Pim v. Wilson* (4).

THE LORD CHANCELLOR.—It would have been a very inconvenient thing, that those whose duty it is to administer equity in this Court, when these questions first arose should have repudiated the jurisdiction and left the parties to fight it out as they might by legal proceedings; but the Court thought it right to exercise a very wise jurisdiction, and one that was clearly within its power. For the interests of the public it was expedient that such a jurisdiction should be

assumed over the parties interested under these various acts, in order to keep all parties within the limits of the powers by these acts conferred upon them. This jurisdiction has been exercised extensively against railway companies, and justice requires that it should be equally exercised against those opposed to them. In cases like the present the act gives certain definite rights: and of all rights that an act of parliament can give, there is none more stringent, or which may be more oppressively enforced, than that which is given to a party complaining of damage done by the works of the company; that is to say, a perfectly unjust claim may be made by way of compensation for injurious damage against a company; and if a company do not within twenty-one days take measures to go before a sheriff's jury, they are to be irrevocably fixed with the whole amount of the claim. They can only escape this by going before a sheriff's jury, and incurring all the expenses of assessing damages for an injury which may not exist, with the certainty that whatever may be the damages assessed, the party claiming has no right to receive them. Then, after this proceeding, an action must be commenced by the party in possession of the verdict of the jury for the sum assessed; and after all this, the claimant may fail to shew that he is entitled to compensation, and there is an end of the contest. To arrive at this conclusion two proceedings will have taken place: namely, the inquiry before the sheriff's jury and the action. Whether or not any compensation may be recoverable by the company in such a case for costs and expenses, it is no small grievance to a company to be dragged through a litigation which can end in nothing, but merely in ascertaining the amount of damage, without the preliminary inquiry whether anything will be due in respect of such damage. The provision in question appears to have been introduced for the purpose of avoiding a mandamus, but without considering what would be the consequences flowing from such a provision. Previously to its introduction, the company could only be compelled to go before a jury by mandamus; and, on the application for a mandamus, the Court decided the question of the right to the compensation. By the law, therefore, as it then stood, a means

(1) 1 Hall & Twells, 377, n.

(2) 6 Q.B. Rep. 759; s. c. 14 Law J. Rep. (N.S.) Q.B. 84.

(3) 4 Mee. & W. 472; s. c. 8 Law J. Rep. (N.S.) Exch. 49.

(4) 2 Phil. 653; s. c. 17 Law J. Rep. (N.S.) Chanc. 428.

existed by which the preliminary question as to the right to compensation might be decided, before the question of the amount of damages was entered upon. Then comes an act of parliament, which for the purpose of correcting a supposed evil creates a much greater one, by depriving the company of the means which they had before, of having the question of right determined before they entered upon the question of damages. This state of things would alone be quite sufficient to justify the interposition of this Court; because it would not be just to permit a party to be involved in a litigation of this sort, without first ascertaining if the right existed as between the claimant and the company. The only remedy for this state of things is an equity which applies to all cases, where a party is sought to be so affected as this company is, by the provisions of the act: namely, an equity to come here for an injunction; and the ground of that equity is, that the claimant, who is seeking to put in force the stringent provisions of the act, does not fall within the description of persons entitled to exercise the powers thereby given. The Court will restrain an individual seeking to enforce against a company powers which he is not entitled to avail himself of, in like manner as it will restrain the company from an excess of its powers with regard to an individual.

The Court for this purpose must ascertain the relative rights and liabilities of the parties; and this raises a question of law. Here is a party whose houses and premises are likely to be more or less affected by the works of the company. Those works are directly authorized by the act of parliament, and they may or may not injuriously affect the owner of these houses. If the company are liable to him, it is obvious that they may also be liable to his neighbours, and the proportionate injury to the several houses in the same street it must be difficult to ascertain. It is important, however, to decide the general question, which, being one of law, ought not to be determined in this Court. The Court upon this motion must either refuse to interfere, which would not be just; or, in order that it may interfere with propriety, it must know what the right is; and for this purpose will put the claimant in the same situation as if a man-

damus had been applied for previously to the passing of this act. Now, there are two modes by which this may be done: the one is, by ascertaining the amount of damage, and then the right to compensation; which course is open to this inconvenience, that after the first process has been gone through, the right may be found not to exist. The other mode is, to do that first which must eventually be done; namely, obtain a decision on the question of right; and, if the claimant fails to establish the right, the question of amount of damages becomes immaterial. Now, the most convenient course without doubt is to have the right tried first; and this comes entirely within the jurisdiction which this Court has so long exercised, in order that the parties may know how they really stand towards each other. I am of opinion that the most convenient mode of trying the question is, that the defendant shall bring an action against the company, the company admitting (according to the terms of the act) that they were served with a demand for compensation, and that they suffered twenty-one days to elapse before they proceeded to summon a jury. That will bring before the court of law all that is required in order to ascertain the right of the plaintiff. If the plaintiff succeeds in the action, then no injury will be done, but this of having the right tried first, and assessing the damages afterwards. The Vice Chancellor seemed to have been of opinion that the proceedings before the sheriff's jury would answer all the purposes. But it is now conceded that that would not be so; and, as it seems to me, this was the difficulty that led to the Vice Chancellor's order. The order will be, to discharge the Vice Chancellor's order, and grant the injunction as prayed; that the defendant be at liberty to bring an action against the company, and that they in such action admit that the defendant has given notice in writing to the company, and has therein stated the nature of his interest in the land in question, and claimed 100*l.* as compensation, in respect of such land being injuriously affected by the works of the company, and that he desires to have the same settled by a jury; and also admit that the company did not within twenty-one days after receipt of such notice issue

their warrant to the sheriff for a jury to settle such compensation; and that after the trial of such action, either party be at liberty to apply; the parties undertaking to use the judgment under the direction of the Court.

L.C. }
Nov. 26. } WILLIAMS v. HODGE.

Practice.—Defendant incapacitated by illness from answering.

Where a defendant was incapacitated from putting in his answer through illness, but was in possession of his mental faculties, an order for a guardian for the purpose of putting in his answer was discharged; the proper course in such a case being to extend the time for answering as occasion may require.

The plaintiff and the defendant in this suit were the executors and trustees appointed by the will of W. C. Reed, who died in 1829, and the object of this suit was to compel the defendant to invest in the joint names of himself and the plaintiff, as such executors and trustees, the sum of 2,600*l.*, being a balance alleged to be owing to the estate of the testator from the defendant. The bill was filed on the 27th of July 1849, and an appearance thereto was duly entered for the defendant.

In November 1849, the defendant's term for answering having expired, an order was made by Knight Bruce, V.C., on the motion of the defendant, that the defendant should have a guardian assigned to him for the purpose of putting in his answer to and defending the suit.

By the evidence of the medical attendants and others, in support of the motion, it appeared that in August 1848, the defendant was attacked by paralysis, and was still labouring under that disease; and that though he was in possession of his mental faculties and capable of understanding business, yet it was absolutely essential to the restoration of his health and the prolongation of his life that he should be kept as far as possible in a composed state of body and mind; and that, in the opinion of the deponents, any personal communication with him on business,

and especially on the subject-matter of this suit (which involved certain disputes), would be highly improper, dangerous, and would tend to the aggravation of his disease, and would, probably, be attended with imminent danger to his life. Before the Vice-chancellor made the above order, he required a statement, on affidavit, from the son of the defendant, who had, since his father's death, acted in the management of his business, of all the deeds and papers in the defendant's possession, relating to the subject-matter of the suit.

The plaintiff now moved before the Chancellor that the order of the Vice-chancellor might be discharged, with costs.

Mr. James Parker and Mr. Renshaw support of the motion.—There is no authority for such an order, except in the case of a lunatic not found so by inquisition in the case of incapacity of mind, or extension of time for answering to meet all the exigencies of the case; then the plaintiff might consider whether he would take an answer without the defendant's signature, and thus proceed with his suit, or whether he would wait for the opportunity of obtaining a full answer. The order made is injurious to the plaintiff and out of any benefit to the defendant.

Mr. L. Wigram and Mr. W. M. Wigram in support of the order.—The Vice-chancellor of England, in a case which was lately before him (*Hills v. Hills*), made a similar order. This defendant is bound to put in an answer at the expiration of his life. Under the 5 Eliz. c. 9. s. 1, a person summoned as a witness, and in such a state of health as this defendant would be held as having reasonable excuse for not attending.

THE LORD CHANCELLOR.—It is a rule that the old practice has not provided for a case of this kind, namely, a defendant being unable to put in his answer through illness; but that it only extends to a case of an impossibility of ever giving an answer. The Court certainly will not compel a defendant to put in an answer at the risk of his life; but if the practice adopted in such a case of assigning a guardian to put in his answer, then

be an end of the plaintiff's right to the chance of an answer, even if the defendant should recover. But if, under the old practice, the Court extends the time for answering, *toties quoties*, as the occasion may require, the right of the plaintiff is preserved, and the defendant is effectually protected. The plaintiff then may, at his option, bring the case before the Court without discovery, or he may wait for the chance of an answer. It is not desirable to make a new practice where the old practice is sufficient. I think the old practice is better calculated to answer the purposes of the parties than the one that has been adopted in this case. The order of the Vice Chancellor, therefore, must be discharged, with costs.

V.C. } THE ATTORNEY GENERAL v.
Jan. 24. } ANDREWS.

Injunction—Commissioners under Act of Parliament—Rates—Expenses of obtaining a New Act.

Injunction granted to restrain the Commissioners of Waterworks of Southampton from applying the water rates levied under their act towards the expenses of obtaining a new act of parliament for extending their powers.

The information stated that, by an act of Parliament passed in the year 1836, 6 & 7 Will. 4. c. xcvi, intituled "An Act for maintaining the public conduits and other waterworks belonging to the town of Southampton, and for providing an additional supply of water for the inhabitants of the said town and neighbourhood," it was enacted, that the mayor, recorder, aldermen and councillors for the time being of the town of Southampton, together with twenty-six of the inhabitants of the said town, qualified and to be elected as therein mentioned, and their successors respectively, were appointed Commissioners for carrying the act into execution under the title of "The Commissioners of the Waterworks of the Town of Southampton." And by the said act it was enacted, that it should be lawful for the said Commissioners to continue and maintain the then present conduits, reservoirs, and other waterworks

belonging to the said town, and to improve and extend the same, and particularly to enlarge the then present reservoirs on the common near Southampton, and to build, erect, construct, and maintain such other reservoirs or waterworks on the said common as might be necessary or convenient, and as the said Commissioners should think proper for furnishing an additional supply of water, and from time to time to alter, repair, or discontinue the same works, or any of them, and to substitute others in their stead, and generally to do and execute all other matters and things necessary or convenient for constructing, continuing, maintaining, altering, repairing, or using the said works, and also to collect and raise water by boring in or under the said common, or by such other ways and means as they might from time to time think proper, and to take and use any spring or streams of water which might be found in constructing the said works, they, the said Commissioners, doing as little damage as possible, and making compensation for any injury that might be sustained by the exercise of such powers. And it was further enacted, that the Commissioners should every six months thereafter make an assessment upon all the occupiers of messuages, tenements, &c., who should be rated and pay to the poor-rates within the said town of Southampton; and also on the owners of all messuages, tenements, &c., within the said town, by an equal pound rate as the said Commissioners should direct, not exceeding 1s. in the pound for any one year, and out of the monies collected by such rates or assessments, should pay the charges and expenses of carrying into execution the purposes of the act. That very considerable and extensive works had been carried on under the provisions of the said act, and that a certain committee, called the Committee of Public Health, was some time since appointed, and such committee made a report to the said Commissioners of Waterworks, and by such report stated, amongst other things, their opinion of the necessity of a further supply of water for the inhabitants of Southampton, and recommended the construction of a new reservoir on the common, and made divers recommendations with reference to an act

of parliament intended to be obtained, and the powers and other matters to be inserted therein. That in pursuance of such report, a meeting of the Commissioners was held to consider the propriety of applying to parliament for powers to obtain a permanent supply of water for the town of Southampton from such sources as might be considered desirable, and to enlarge and amend the present Waterworks Act; and it was then resolved, by a majority of twenty Commissioners against two, that the clerk be instructed to give the necessary public notices for obtaining parliamentary powers to enable the Commissioners to carry into effect the recommendations of the said Public Health Committee; that such notice was subsequently given, and it stated, amongst other things, that the Commissioners intended to apply for a bill to enable them to obtain powers for the construction of additional waterworks for the better supply of the town with water, and for the construction and erection of necessary engines, buildings, reservoirs and works for that purpose; and to enable the Commissioners to take water from certain lands and springs in the parishes of North and South Stoneham, and from the River Itchen Navigation in the county of Southampton, and from other places; and it was intended by the said bill to obtain powers to compel the owners of all rateable property included within the limits of the said bill to be rated to, and to pay all rates authorized to be levied under the said recited act, or the proposed bill, instead of the occupiers thereof. That at a meeting of the said Commissioners of Waterworks, held on the 3rd of December 1849, it was, amongst other things, resolved that the sum of 250*l.* be advanced to the clerk in part to meet the necessary expenses of obtaining the said intended act of parliament. That such resolution was, however, protested against as being an unlawful application, or intended application, of the funds of the Board. That, nevertheless, in furtherance of the above resolution, a cheque was drawn by the said Board for the sum of 250*l.*, and was paid by the bankers on their account out of monies raised and forming part of the rates levied under the above-recited act.

That the rates so raised and levied were public trust monies, and under the circumstances aforesaid no persons had any right to authorize the payment thereof for any other purposes than those specified in the said act, and the application of them towards defraying any of the expenses of the intended act of parliament would be illegal, and a breach of trust; that the said Commissioners of Waterworks intended also to apply towards the expenses of the said application to parliament for a new and additional act, further large sums of money, being part of, and arising from the said water rates, unless restrained from so doing by the order of the Court.

The information prayed that it might be declared that the rates raised under and by virtue of the said recited act were not applicable in or towards the payment of the expenses of attempting to procure the said intended new act, or of preparing or promoting or prosecuting any such bill in parliament. And that the said Commissioners of Waterworks might be restrained by injunction from paying, or authorizing or causing to be paid, any monies being part of, or arising, or to arise from rates levied under or by virtue of the said in part recited act, in or towards the expenses incurred, or to be incurred, in or about the promoting or prosecuting the said act of parliament or connected therewith.

Mr. Bethell and *Mr. Giffard*, in moving for the injunction in the terms of the prayer; cited the case of *The Attorney General v. the Guardians of the Poor of Southampton* (1), in which the guardian of the poor had applied for an act to authorize the levying of poor-rates upon the owners instead of the occupiers of small tenements, and an injunction was granted to restrain the defendants from paying the expenses of obtaining the out of the poor-rates. The cases of *Attorney General v. the Corporation of Liverpool* (2) and *The Attorney General v. the Corporation of Norwich* (3) were relied upon to shew that the Commissioners of Waterworks had no power to apply

(1) 18 Law J. Rep. (N.S.) Chanc. 393.

(2) 1 Myl. & Cr. 171; s. c. 7 Law J. R Chanc. 51.

(3) 16 Sim. 225.

dants to bring in their examination, which was not done till after the time had been twice extended. Upon an inquiry into the sufficiency of the examination, it was for the first time objected, that the plaintiff should have taken in a state of facts before proceeding on the examination; and subsequently it was objected, that the interrogatories should not have been allowed without a previous state of facts being taken in on behalf of the plaintiff. The Master adjourned the inquiry :—Held, on a motion to discharge the Master's certificate, that the Master was not wrong in allowing the interrogatories without a state of facts; that any irregularity had been waived by the submission of the defendants, and the allowance of time to put in the examination; that the decree warranted a special interrogatory without a special state of facts; that in case of difficulty the Master might direct a state of facts to be laid before him; and the motion was dismissed, with costs.

This was a motion that the certificate of the Master, dated the 28th of May, and filed the 4th of June 1849, certifying that in pursuance of the decree made in these causes he had settled, signed, and allowed interrogatories for the examination of the defendants George Allfrey, Robert Allfrey, and Margaret Allfrey might be taken off the file, and that the certificate or report might be quashed.

By the decree made in these causes, it was declared, that the plaintiff was not bound by certain settlements of accounts, and that such accounts ought to be opened, and it was referred to the Master to take an account of the personal estate of George Allfrey, possessed by Edward Allfrey, and to inquire what balances of the personal estate, and of the rents and profits of the real estate of the intestate George Allfrey were in the hands of Edward Allfrey, deceased, at the end of each year after the intestate's death, and liberty was given to state special circumstances. The case is reported in 17 *Law J. Rep.* (N.S.) Chanc. 30.

On the 20th of March 1849 there was an attendance before the Master, who considered the decree, and directed that the plaintiff should bring in interrogatories before him for the examination of the defendants.

On the 10th of May a draft of the inter-

rogatories was left at the Master's office, and a copy was sent to the solicitor of the defendants. On the 28th of May there was an attendance before the Master to settle the interrogatories.

The fourth interrogatory contained in the draft required the defendants to state whether there were or not, or was or not, any and what sum or sums of money due and owing from Edward Allfrey, the administrator of the intestate George Allfrey, to the estate of George Allfrey, and if yea to set forth a particular account of all such sum and sums of money. To that interrogatory an objection was taken by the solicitor of the executors of Edward Allfrey, but upon inspecting a book proved in the causes, containing an account of the estate of the intestate George Allfrey, which commences on the credit side thereof by debiting Edward Allfrey and crediting the estate of the intestate George Allfrey with the following item :—“1802, February. By balance agreed, 1,353*l.* 10*s.* 5*d.*,” the Master overruled the objection and allowed all the interrogatories, and appointed a time for the defendants to bring in their examination in answer to the interrogatories of the plaintiff.

On the 4th of June the certificate now complained of was filed; and on the 22nd of June, and again on the 30th of June, the defendants applied to the Master and obtained further time for putting in their examination.

On the 30th of July the defendants took their examination into the Master's office, and on an attendance before the Master, on the 17th of November, to inquire into the sufficiency of the examination, it was for the first time objected, that the plaintiff ought to have taken in a state of facts before proceeding on the examination, and that otherwise the Master would not be able to understand the examination of the defendants; and, subsequently, it was objected, that the plaintiff ought, in the first instance, before he left the interrogatories for the examination of the defendants, to have left a state of facts and charge against them with the Master, and have supported that state of facts by evidence, and then, if he thought it necessary, to leave interrogatories for the examination of the defendants in support of it, but that no interrogatories ought to

have been allowed without a previous state of facts being brought in on behalf of the plaintiff.

Upon this objection the Master adjourned the further consideration of the matter, that the defendants might have an opportunity of applying to this Court, upon which the present notice of motion was given.

Mr. Turner and *Mr. Hislop Clarke*, for the defendants, in support of the motion.

Mr. Walpole and *Mr. Rasch*, for the plaintiff.—The proceeding of the plaintiff is regular, but, if irregular, the irregularity has been waived by the acquiescence of the defendants. This case is governed by the 50th Order of April 1828, *Ord. Can. 21*, which points out the manner of bringing the decree under the consideration of the Master. By the 51st Order of April 1828, *Ord. Can. 22*, the Master is to regulate the proceedings and the mode of executing the decree. The Master directed interrogatories to be brought in by the plaintiff for the examination of the defendants; and such a direction is clearly contemplated by the 61st Order of April 1828, *Ord. Can. 25*. These three Orders now regulate the practice of the Court; and the last points out the manner of taking the accounts. Before these Orders, the usual course of proceeding under decrees to take accounts in the Master's office, was for the plaintiff in the first instance (where it was necessary) to examine the accounting party upon interrogatories: and then from the defendant's examination, and from his answer, and the schedules thereto, or from the other evidence or papers in the cause, to prepare a charge against him. This was a statement of the several items, which the plaintiff claimed to be entitled, upon proof, to charge the defendant in the account. This charge was left with the Master and the different items in it were investigated in the Master's office. When the charge was gone through, the defendant brought in his discharge, containing a statement of payments and disbursements made by him, and other matters, by which he claimed to discharge himself from the debt attempted to be made out against him by the charge—2 *Dan. Ch. Prac.* 877, 1st ed., and *Headlam's* ed. 1173 (1). The objection

now made will deprive the plaintiff of the means of examining the defendants. There are cases in which a state of facts ought to be taken in, but they relate to witnesses, not to the parties to a suit—*Willan v. Willan* (2), and particularly not to the accounting party. The defendants also acquiesced in the proceedings, and never took any objection until the sufficiency of their examination was questioned. The fourth interrogatory was nothing more than an inquiry whether or not any sum was due from Edward Allfrey to the intestate George Allfrey, and an answer "yes" or "no" would have given the plaintiff a right to take into consideration the answer of the defendants, but this objection ought to have been taken by exception and not by motion—*Chennell v. Martin* (3), *Chalk v. Thompson* (4). The Master also might have directed a debtor and creditor account to be brought in.—

Moore v. Langford, 6 Sim. 323; s. c.

4 Law J. Rep. (N.S.) Chanc. 228.

Hopkinson v. Bagster, 1 You. & C. C.C. 13.

Cotham v. West, 1 Beav. 380.

2 *Smith's Chanc. Prac.* 125.

Sidden v. Forster, 1 Sim. & Stu. 335.

Dan. Chanc. Prac. 1145, 1139, *Headlam's* ed.

Allfrey v. Allfrey, 10 Beav. 353; s. c.

17 Law J. Rep. (N.S.) Chanc. 30;

1 Hall & Twells, 179; 1 Mac. & Gor. 87.

Morgan v. Lewis, 1 Newl. Chanc. Prac. 533.

In re Mackrill, 11 Beav. 42.

Archbishop of York v. Stapleton, 2 Atk. 136.

Mr. Turner, in reply.—The plaintiff alleges that the objection taken by the defendants throws the *onus probandi* upon him, but where it is desired to go beyond the common interrogatories, special circumstances must be shewn, and a special case must be made out. It is not denied that these interrogatories extended beyond the common course in administration suits. The waiver of any objections may have to be considered upon the question of costs, but the Court

(2) 19 Ves. 590; s. c. Coop. 291.

(3) 4 Sim. 340; s. c. 9 Law J. Rep. Chanc. 208.

(4) 4 Sim. 350.

(1) 1 Newl. 529.

never allows it to affect substantial justice. The motion ought, therefore, to be granted, and leave should be given to except so far as refers to the fourth interrogatory.

Jan. 31.—THE MASTER OF THE ROLLS. —The fourth interrogatory was the only one to which any objection was taken, and considering the nature of this suit, and of the decree, and that the book containing the items relating to the estate of George Allfrey was produced before the Master, and was evidence in the cause, I think the Master was not wrong in allowing the interrogatories without a state of facts to found them upon; and if there had been any irregularity in this, I think it would have been waived by the submission, and the repeated allowance of time which the defendants obtained. It was said that without a state of facts the Master could not understand the case, and argued that the interrogatory complained of goes beyond the ordinary course in administration suits: I think it does; but this is not an ordinary decree in an administration suit, and I think that the decree under which the book was produced warranted a special interrogatory without a special state of facts. If the Master should find a difficulty in understanding the case for want of a state of facts, I presume he would direct it to be laid before him. But seeing no reason to think that the interrogatories were improperly allowed, and being of opinion that the irregularity, if any there were, was waived, I must refuse this motion with costs.

V.C. { THE KING OF THE TWO
Jan. 28, 29 ; { SICILIES v. THE PENIN-
Feb. 7. { SULAR AND ORIENTAL
STEAM PACKET COMPANY.

Foreign Sovereign Prince, Right of, to sue in this Country—Doctrine of Ear-mark—Subjects in Rebellion—Demurrer for want of Parties—Ship Registry Act.

During the rebellion in Sicily, agents were sent to England by the usurping government who contracted with the Peninsular and Oriental Steam Packet Company for the purchase of two vessels and paid

the purchase-money. One was transferred to the agents, and was taken away from this country. The other vessel was registered in the names of two English subjects, who were alleged to be trustees for the agents of the usurping government, and it had not yet been removed from England. The plaintiff, the King of the Two Sicilies, upon being restored to his government, filed a bill praying that he might be declared entitled to the second vessel, and for an injunction to restrain the company from parting with it. An injunction ex parte having been obtained against the company, it was dissolved, with costs, upon the ground that they had parted with all interest prior to the bill being filed. Upon demurrer, by the defendants, in whose name the vessel was registered, it was held, that the plaintiff had a right to follow to this country property which had been abstracted from the public treasury by his rebellious subjects, and that it was not necessary to make the members of the usurping government parties.

This case came on upon motion to dissolve an injunction granted, *ex parte*, on the 3rd of December last, on behalf of his Majesty the King of the Two Sicilies, to restrain the defendants, the Peninsular and Oriental Steam Packet Company, from delivering up a vessel called the *Bombay*, which had been purchased by two persons named Granatelli and Scalia, who had been sent over to this country for that express purpose, at the time of the late revolution, by the government then in existence. The case also came on upon demurrer to the plaintiff's bill, by two persons named Brodie Wilcox and John Moody, in whose name the vessel had been registered under the act for the registration of ships.

The bill stated that the plaintiff had been, and was now, the lawful sovereign of the kingdom of the Two Sicilies, and that from a time long anterior to the plaintiff becoming such sovereign up to the present time, the island of Sicily had formed, and now formed, part of such kingdom, and that the plaintiff, in right of his sovereignty, was entitled to the whole of the revenue of his said kingdom, and to the administration thereof. That the city of Palermo was situated in the island of Sicily, and that in the early

part of the year 1848, and before the month of July in that year, certain persons, subjects of the plaintiff, usurped the plaintiff's authority and regal functions, and had established in Palermo a species of government, which was constituted of certain individuals, subjects of the plaintiff, and was designated by the several titles of the "Government of Sicily," the "Sicilian Government," and the "Executive Power," and such usurping government had, immediately upon being so established, and without the consent and against the will of the plaintiff, unlawfully assumed the administration and direction of the public affairs of Sicily, and continued to exercise the same until the month of April 1849. That such usurping government, and certain persons acting under its authority, had, immediately on such government being so established, seized the royal public treasury of the plaintiff in Palermo, and had taken possession of all the monies which were in such treasury, and of all monies which were paid into the same, being part of the plaintiff's royal revenues. That the said usurping government had from time to time assumed to appoint certain individuals, being subjects of the plaintiff, to the offices properly filled by the plaintiff's ministers, and in particular to the offices of minister of finance, minister of foreign affairs and commerce, and ministers of other public departments, respectively, for the said island of Sicily, and the persons so from time to time appointed had assumed and exercised, during the continuance of the said usurping government, the management of the affairs of the public departments to which such persons were assumed to be appointed respectively. That shortly before July 1848, the persons so assuming to act as ministers appointed the Prince Franco Maccagnone Granatelli and Lorio Scalia, two of the defendants, both of whom were subjects of the plaintiff, to be their agents in England, and they, by the direction of such government, proceeded to England as such agents. That shortly before or at the beginning of July 1848, Granatelli and Scalia, by direction and on behalf of the said usurping government, had entered into a contract with the defendants, the Peninsular and Oriental Steam-

packet Company, for the purchase of two steam-ships, of which one had been lately built, and was nearly completed, and the other was then being built, and both of which belonged to the same company; and such contract was to be subject to the ratification of the said usurping government. The contract, which bore date the 1st of July 1848, and was signed by the defendant Charles Wellington Howell, the secretary of the company, on behalf of the company, and by Granatelli and Scalia, was to the following effect:—Granatelli and Scalia, therein described as commissioners of the Sicilian Government, agreed to buy, and the said Peninsular and Oriental Steam-ship company thereby agreed to sell the steam-ship called the *Vectis*, built at Cowes, of 905 tons burthen for 45,000*l.* and also the *Bombay*, the least advanced of the two steam ships, of 1,209 tons burthen, then building for the said company by Mr. J. Pitcher at Northfleet, for 60,000*l.* to be paid as follows—20,000*l.* on the ratification of the agreement, and the further sum of 20,000*l.* when the two steam-vessels should be completed for sea, so far as related to the said company, in the same state as contracted for by the builders, and that any alterations required by the said purchasers for war purposes should be made by them at their own expense, and that the balance of the said purchase-money, with interest at 5 per cent. per annum, should be paid by bills, on such security as might be approved of by the said company, in two equal payments at three and six months' date, on the delivery of the said vessels, and that upon completion of the purchase, bills of sale should be made out and executed, and that the said steam-vessels, with what belonged to them, should be delivered according to the specification therein referred to. And in the margin of the contract was written the following memorandum—"It is stipulated by the contracting parties that the agreement is subject to ratification by the Sicilian government." That the usurping government was informed of the said contract; and on the 10th of July 1848, declared that such government ratified the same. That the defendants had been informed of such ratification and memorandum; that the steam-ship in the contract referred to

as the least advanced of the two steam-ships, then building at Northfleet, had since been so far completed as to be ready for sea, and had been denominated the *Bombay*; that in the latter part of July and August 1848 the usurping government applied divers sums of the plaintiff's revenue, being monies paid into the plaintiff's said royal treasury at Palermo (of which they had taken possession as aforesaid), in purchasing or procuring bills of exchange for the purpose of such bills being remitted to England and applied towards completing the purchase of the said steam-ships, the *Vectis* and the *Bombay*, and the Sicilian monies so applied were equivalent, and the bills of exchange so purchased or procured amounted to the total sum of 20,000*l.* and upwards, of British money, and were made payable to the order of Granatelli and Scalia, and were remitted with directions to apply the same towards completing the purchase of the said steam-ships, and the defendants received such bills and applied them or the amount thereof in paying to the company, who well knew how and whence the money was obtained, the first instalment of 20,000*l.* payable under the said contract, and certain other sums in respect of the payment of the second instalment of the purchase-money in the month of December 1848. The payment after that date of the balance out of funds taken from the royal treasury at Palermo was alleged in a similar manner. And the next allegations were, that the company after receiving the second instalment of 20,000*l.* delivered the said steam-ship, the *Vectis*, to Granatelli and Scalia, or to officers and sailors employed by them, and the same was sent, in the month of March 1849, from England to and had ever since remained in parts beyond the seas; and that the steam-ship, the *Bombay*, had, ever since the completion of the building thereof, been and now was in the port of London, and the same remained until May 1849 in the possession or under the power of the said company. That in the month of April 1849, the plaintiff's lawful authority was re-established in Palermo and in the other parts of the island of Sicily, and the plaintiff thenceforth continued and now remained in the undisturbed exercise of such authority. That the

money taken from the royal public treasury at Palermo, and which belonged to the plaintiff as such sovereign as aforesaid, and the bills purchased with such money had been, with the knowledge of the said company, applied in or towards paying the purchase-money for the said steam-ships, the *Vectis* and the *Bombay*; and the plaintiff became entitled to require the delivery to him of the same ships, and was now entitled to have the vessel called the *Bombay* so delivered up to him. That the said Peninsular and Oriental Steam Packet Company, and the persons acting on their behalf, entered into the contract for the sale of the said steam-ships, and received the purchase-money for them, with full notice and knowledge on their part that the said Granatelli and Scalia were acting therein on behalf of the said usurping government, and that the money for such purpose was taken out of the plaintiff's royal treasury at Palermo and belonged to the plaintiff as such sovereign as aforesaid. That neither Granatelli, nor Scalia, nor any member of the said usurping government had ever been a subject of Great Britain. That after the said Granatelli and Scalia had made the purchase, they and their legal advisers formed a scheme and design (which the other defendants had assisted them in endeavouring to carry into effect) of availing themselves of the provisions of the act for the registering of British vessels with respect to the said steam-ship, the *Bombay*, for a purpose contrary to the policy of such act, and in such manner as to defeat the just rights of the plaintiff and to benefit the said Granatelli and Scalia. That in pursuance of that scheme and design, Granatelli and Scalia requested the said company, immediately on the said steam-ship being so far completed that the same could be registered, to have it so registered in the name of the said company, who, although they had then ceased to be the real owners thereof, did nevertheless, in compliance with such request and for the purpose of assisting Granatelli and Scalia in their scheme, cause the ships to be registered in the name of the said company as the owners thereof. That the plaintiff had, since the 28th of November 1849, for the first time discovered this. That in pursuance of

this scheme the company did, on the 16th of May 1849, at the request of the said Granatelli and Scalia, execute a bill of sale of thirty-two sixty-fourth shares of the ships to the defendant, Brodie Wilcox, therein described as a ship-owner, and of twelve sixty-fourth shares to the defendant, John Moody, also described as a ship-owner; and of the remaining twenty sixty-fourth shares thereof to George Herring, ship-broker. That Wilcox, Moody, and Herring had not, in fact, purchased the said ship nor any shares thereof from the said company; but the ship was, in truth, purchased from the company by Granatelli and Scalia by means of money belonging to the plaintiff, as aforesaid. That the said Wilcox, Moody, and Herring did not, nor did any of them, ever pay or give any consideration for such bill of sale, but were known by the said company to be mere trustees of Granatelli and Scalia. That, in fact, the said B. Wilcox was not a ship-owner, but was a clerk in the employ of the company, and that he was the attesting witness to the contract of July 1848; and that J. Moody had never been a ship-owner, but was employed in the command of vessels, and was engaged by Granatelli and Scalia, on behalf of the usurping government, to take the command of the *Bombay*; and that George Herring was employed by Granatelli and Scalia as a ship-broker, in relation to the same ship. That the plaintiff had since the 28th of November last discovered that, in pursuance of the said design, the said G. Herring, at the request of Granatelli and Scalia, did, on the 7th of June last, execute a bill of sale of the said twenty sixty-fourths of the said ship, assigned to him by the bill of sale of the 16th of May, to the said B. Wilcox, and that the said B. Wilcox had not in truth purchased the said twenty sixty-fourth shares of the said ship, and that he did not give any consideration for the execution of the bill of sale thereof to him, and he was, therefore, a mere trustee thereof for the said Granatelli and Scalia; but that if the said B. Wilcox, S. Moody, and G. Herring, or any of them, paid any consideration for the execution of such bills of sale, such consideration was paid, with full notice of the plaintiff's claim to such ship and of the ground of

such claim, and subject to an agreement that such consideration should be repaid if the plaintiff should establish his right to such ship; and that in further pursuance of the said scheme, the registration of the said bills of sale was purposely delayed until the 27th and 28th of November last, in order to prevent the plaintiff discovering the names of the said Wilcox, Moody and Herring, as the alleged owners of such ships. That the bill of sale of the 7th of June was executed before the bill of sale of the 16th of May had been registered, and that it was unusual for the purchaser of any registered vessel or of any shares therein, to purchase the same from, or accept a bill of sale thereof, executed by persons who, at the time of such execution, were not owners of such vessel. That the plaintiff's agents suspected some such scheme and design, but that in consequence of their not being able until the 29th of November to discover that the said Wilcox, Moody and Herring were the alleged owners of the ship, the plaintiff was unable, till after the last-mentioned day, to commence proceedings against them in this court. That on the 28th of November the solicitors of the plaintiff, in answer to an application made by them to the Commissioners of Customs, received a letter from the said Commissioners, acquainting them that the certificate of registration of the *Bombay*, together with two bills of sale, were left for registration on the previous day, and the Board had directed the vessel to be registered in the names of the present purchasers; the solicitors having advised them that they had no other alternative than that of obeying the act for the registration of vessels; that on the following day, the 29th of November, Messrs. Crowder & Maynard caused the register book to be examined, and found that the usual particulars as to such registry had been entered; that by these means the said B. Wilcox the younger now appeared to be the registered owner of fifty-two sixty-fourth shares of the said steam-ship, the *Bombay*, and the said J. Moody now appeared to be the registered owner of the remaining twelve sixty-fourth shares thereof, although both the bills of sale were merely colourable, and Wilcox and Moody were in truth trustees for Grana-

telli and Scalia. That the plaintiff's agents had been unable to discover in whose possession the *Bombay* was from the 16th of May till the 28th of November, but the said Wilcox and Moody, having now the controul over her, did intend, unless restrained by the Court, to send her away, without the plaintiff's consent, from England to some parts beyond the seas, and not in the dominions of the plaintiff; and that they also intended to execute some bill of sale, or other disposition thereof, in favour of some person unknown to the plaintiff, without giving such person notice of the plaintiff's claim thereto. That the said ship having, before the same was so far completed that she could be registered, ceased to belong to the company, and never having since a time anterior to the registry thereof belonged to any person being a subject of Great Britain or otherwise entitled to the benefit of the act for the registry of British vessels, the registration thereof and the entry of the bills of sale were acts in fraud of the provisions of the said act of parliament and in violation of the just rights of the plaintiff, whose monies had been invested in the purchase of such ships. The bill prayed that the defendants might be decreed to deliver the said steam-ship, the *Bombay*, to the plaintiff; and that in the mean time the defendants might be restrained by injunction from delivering the said steam-ship to any other person or persons, without the consent of the plaintiff, and from causing or permitting the same to be taken out of England and from making any preparation for so doing, and from parting with the possession or controul thereof, without the plaintiff's consent, and from making and executing or causing to be registered any bill of sale or other disposition thereof, and from doing and suffering to be done any other act affecting the same ship, unless with the consent of the plaintiff.

To this bill the defendants Wilcox and Moody filed a demurrer, dated the 18th of December last, on the ground that the plaintiff had not, by his bill, made such a case as would entitle him to any discovery or relief from these defendants touching the matters contained in the bill, and also because various persons who were not made parties to the said bill were

necessary parties, particularly the persons therein referred to as being the "Government of Sicily," or "The Sicilian Government," or "The Executive Power," or the persons filling the public offices in the said bill mentioned under the said government, or some of them.

An injunction having been obtained, *ex parte*, against the Peninsular and Oriental Steam-Packet Company, to restrain them from delivering up the vessel called the *Bombay*,—

Mr. Stuart and *Mr. Chandless* now moved to dissolve that injunction, and contended that the Peninsular and Oriental Company had no legal interest in the vessel, as they had transferred all right to her before the injunction was obtained. That such vessel was now registered in the proper form required by the act in the names of British subjects; and there was not sufficient evidence to enable this Court to say that the money expended in the purchase was other than the money of such registered owners.

Mr. Bethell and *Mr. Goldsmid*, in support of the injunction, contended that the vessel was not transferred by the company until after the plaintiff's power was re-established. That the company well knew the purchase-money was remitted to the defendants, Granatelli and Scalia, by the usurping government; and that it was sufficiently proved that the transfer to Wilcox and Moody was part of a scheme for the purpose of enabling the registry of the vessel to be effected in the names of British subjects, though, in fact, she still remained the property of the persons who had been sent over by the usurping government to purchase the same.

The VICE CHANCELLOR. — The real question now seems to be, who is to pay the costs? That is, whether the company are to have their costs, or the other side is to be released from the payment. Now, it appears that four days before the injunction was granted, which was on the 29th of November, the company, by registering the vessel in the names of third parties, got rid of all their interest; and when the application for the injunction was made they had, in fact, nothing whatever to do with the matter. Upon considering the

case over, it occurs to me that, as a general rule, if a plaintiff will file his bill against a defendant after the time at which such defendant has ceased to have an interest, the only thing to be done is to make the plaintiff pay the costs. The injunction must, therefore, be dissolved, with costs.

Jan. 28.—The demurrer of Wilcox and Moody now came on for argument.

Mr. Rolt and Mr. Cairns appeared in support of the demurrer, and contended that this Court could not interfere on behalf of the plaintiff, the King of the Two Sicilies, to enable him to obtain the benefit of a contract entered into by the agents of the government which had usurped his power. The King by his bill put forward a claim to the ship called the *Bombay*, because it had been purchased by agents of the usurping government with money taken from the public treasury. The plaintiff had not, however, made out that he was entitled to this money by the law of Sicily. The case was one of two contending powers. The usurping government had been in power for about twelve months, and had during that time become possessed of property in the course of the war; and this Court had no power to assist the plaintiff, upon his re-instatement in power, to obtain what had been possessed by the usurping government and invested in this country. The only books in which any distinct authority appeared bearing upon this case were, *Vattel's Law of Nations* and *Puffendorf's De Jure Belli*. In Chitty's translation of *Vattel*, p. 424, there is the following passage:—"When a party is formed in a state who no longer obey the sovereign, and are possessed of sufficient strength to oppose him, or when a republic the nation is divided into two opposite factions and both sides take up arms, this is called a civil war. Some writers confine this term to a just insurrection of the subjects against their sovereign, distinguish that lawful resistance from rebellion, which is an open and unjust resistance. But what appellation will they give to a war which arises in a republic by two factions, or in a monarchy between two competitors for the crown? Custom appropriates the term of 'civil war' to every war between the members of

one and the same political society. If it be between part of the citizens on the one side and the sovereign, with those who continue in obedience to him, on the other, provided the malcontents have any reason for taking up arms, nothing further is required to entitle such disturbance to the name of civil war and not that of rebellion. This latter term is only applied to such an insurrection against lawful authority as is void of all appearance of justice. The sovereign, indeed, never fails to bestow the appellation of rebels on all such of his subjects as openly resist him; but when the latter have acquired sufficient strength to give him effectual opposition, and so oblige him to carry on the war against them, according to the established rules, he must necessarily submit to the use of the term 'civil war.' * * "It produces in the nation two independent parties, who consider each other as enemies and acknowledge no common judge. Those two parties, therefore, must necessarily be considered as thenceforward constituting two separate bodies. They stand in precisely the same predicament as two nations who engage in a contest, and, being unable to come to an agreement, have recourse to arms." Thus, then, it was evident that the revolution in Sicily was a civil war, and the contending parties were to be looked upon in the same light as two contending nations. Then, in p. 426 of the translation of *Vattel*, there occurred the following passage:—"As to the other effects which the law of nations attributes to public war, see chap. 22. of this book, and particularly the acquisition of things taken in war, subjects who take up arms against their sovereign, without ceasing to acknowledge him, cannot lay claim to the benefit of those effects. The booty alone, the moveable property carried off by the enemy, is considered as lost to the owners; but this is only on account of the difficulty of recognizing it, and the numberless inconveniences which would arise from the attempt to recover it. All this is usually settled in the edict of pacification or the act of amnesty. But when a nation becomes divided into two parties absolutely independent and no longer acknowledging a common superior, the state is dissolved, and the war between the two parties stands on the same ground

in every respect as a public war between two different nations. Whether a republic be split into two factions, each maintaining that it alone constitutes the body of the state, or a kingdom be divided between two competitors for the crown, the nation is severed into two parties, who will mutually term each other rebels. Thus there exist in the state two separate bodies who pretend to absolute independence, and between whom there is no judge. They decide their quarrel by arms, as two different nations would do. The obligation to observe the common laws of war towards each other is therefore absolute,—indispensably binding on both parties, and the same which the law of nature imposes on all nations in transactions between state and state."

It was well known that this country was not in alliance with the King of the Two Sicilies. There were two contending powers, and both parties stood in the position of being at war with each other. One had established a government *de facto*. This government did not interfere between the two, and both stood upon the same grounds as in a public war between two nations. Then, who had a right to the property taken by the *de facto* government? The property was placed in this case out of the King's power, it was hostilely seized. This country recognized them as two contending powers, and yet the plaintiff asked a tribunal of this country to give him what was thus seized. *Vattel* said, at p. 385, "that the property in moveable effects is vested in the enemy the moment they came within his power," that was the case during the war. Then the enemy removed the property, and became possessed of it. Suppose the plaintiff had alleged by his bill that the enemy had been driven out of the country except as to one spot, perhaps a barren rock, surely the time would not then have arrived for the Court to return the property to the plaintiff. The Court could not return to one party what the other party had not the complete power of taking. By what right, then, could the plaintiff get back the property now that the war was at an end? There could be no appeal to nations to decide to whom the property belonged which was taken during the war. To take away from a conquered

enemy what he had taken would be a notion that had never entered into the mind of any writer. The enemy established a right to certain property, and brought it into this country, and then the plaintiff came to demand it. Here the parties had put themselves into a hostile position, and they were to be treated as two contending powers, while the war was actually going on. It could never be contended, that while the war continued the King could have come to this country for the property taken from the public treasury. This country treated both parties indifferently. Then came the question whether the property could be recovered after the war. Suppose the present Republican Government of France were to place funds in this country for fear of being driven out of France, and then suppose the last dynasty were restored, would it be consistent with the law of nations that this country should restore the money so deposited to the restored dynasty? But if the law of nations were different, then the King would only have to apply to the powers of the British government and ask for redress from it. It might be a subject of appeal from one government to another, and an arrangement might be made by parliament; but there was no contract which this Court could enforce. The Admiralty Court of this country could have no power to administer the law upon this subject without being delegated by the government. Neither could this Court deal with it, except by being delegated by the government. How could this Court say that the war had terminated? It might only be smothered. It would be for the government to decide that, and the plaintiff could not obtain that object except by treaty with this country. The next point was as to the demurrer for want of parties. The plaintiff said that Messrs. Wilcox and Moody were mere trustees: but trustees for whom? For the plaintiff's enemy? Surely there could be no decree in the absence of those very persons who, upon the allegations in the bill, constituted these gentlemen trustees. The Sicilian government, then, of that period ought to have been made parties. Then, as to the Ship Registry Act, on the one side, it was said the moment the ship was transferred and

registered, that constituted a title against the world; on the other hand, it was said that no person not a British subject could be owner of a ship. But there was nothing to shew that a foreigner might not transfer a ship to a British subject. The allegation in the bill was, that the whole transaction with regard to Messrs. Wilcox and Moody was a scheme and design formed for the purpose of evading the Registry Act, and that in fact, Granatelli and Scalia were owners of the ship during the whole period. But this could not be said to divest Messrs. Wilcox and Moody of the legal title. The following cases and authorities were also cited during the argument:—

Le Caux v. Eden, Dougl. 572.

Elphinstone v. Bedrechund, 1 Knapp, 316.

Barclay v. Russell, 3 Ves. 424.

Mitchell v. Rodney, 2 Bro. P.C. 423.

Ex parte Lynch, 1 Mad. 15.

Thompson v. Smith, 1 Mad. 395.

Thompson v. Leake, 1 Mad. 39.

Vattel's Law of Nations, *Chitty's Trans.* p. 161, 162, 392, 393, 423, 426.

Puffendorf, *De Jure Belli*.

The Ship Registry Act, ss. 5. and 38(1).

Wheaton's Treatise on International Law, p. 434.

(1) 8 & 9 Vict. c. 89. s. 5.—“That no ship or vessel shall be registered, or, having been registered, shall be deemed to be duly registered by virtue of this act, except such as are wholly of the build of the said United Kingdom, or of the Isle of Man, or of the islands of Guernsey or Jersey, or of some of the colonies, plantations, islands, or territories in Asia, Africa, or America, or of Malta, Gibraltar, or Heligoland, which belonged to Her Majesty, her heirs, or successors, at the time of the building of such ships or vessels, or such ships or vessels as shall have been condemned in any Court of Admiralty as prize of war, or such ships or vessels as shall have been condemned in any competent court as forfeited for the breach of the laws made for the prevention of the slave trade, and which shall wholly belong and continue wholly to belong to Her Majesty's subjects, duly entitled to be owners of ships or vessels, registered by virtue of this act.”

Section 38.—“That when and so soon as the particulars of any bill of sale or other instrument by which any ship or vessel, or any share or shares thereof, shall be transferred, shall have been so entered in the book of registry as aforesaid, the said bill of sale, or other instrument, shall be valid and effectual to pass the property thereby intended to be transferred as against all and every person and persons whatsoever, and to all intents and purposes, except as against such subsequent pur-

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Mr. Bethell and *Mr. Goldsmid*, on behalf of the plaintiff, contended that by this bill the plaintiff was alleged to be the rightful owner of the revenues of the kingdom of Sicily; this allegation was in conformity with the laws of this country, and that passage, if rightly interpreted and understood, would be an answer to all the arguments affecting title. The bill represented that certain persons “subjects of the plaintiff,” usurped the government, and that such persons unlawfully conducted the government in opposition to the Crown. It had been argued that this was a lawful government whose acts were to be recognized. It was true that this Court must in many instances ascertain what governments were to be recognized, and it had been laid down that the Judges of this country were bound to look to what was the lawful government of Sicily. Now, it was a fact that the King was lawfully recognized by this country during the whole time referred to in this bill, and no other government had been recognized. The bill alleged that these monies so taken by the defendants were part of the royal revenue and taken from the royal public treasury. According to the law of this country, the only government that could be recognized would be that with which this government was in relation. To support the argument on the other side, the Court must recognize those persons under the term “The Sicilian Government” who never were in relation with this country. It was not necessary to shew what the law of Sicily was. There was the general principle that the money was the public money, and that the King might sue on behalf of his subjects. This principle was recognized in the case of *Hullett v. the King of Spain* (2). It must be presumed that the King's right was according to this general principle, when there was no averment to the contrary. The objections raised against this bill had been founded upon various passages in *Vattel* shewing, as it had been alleged, that the rebel subjects of a king when in war against

chasers and mortgagees who shall first procure the indorsement to be made upon the certificate of registry of such ship or vessel, in manner hereinafter mentioned.”

(2) 2 Bligh, N.S. 31.

2 E

their sovereign, were entitled to the rights of belligerent parties, and property taken by them could not be reclaimed by the opposite party when they came into power again. Now, in the first place the suggestion that our Courts would regard governments in rebellion against friendly powers as entitled to the rights of belligerent nations was wholly irreconcilable with the doctrines in *Jones v. Garcia del Rio* (3) and *Taylor v. Barclay* (4). It had been argued that this Court would recognize such governments for collateral, though not for direct, purposes. The authorities above cited would shew that such was not the case, even while such governments were in existence; but here the Court was asked to recognize the usurping government, directly, although that government was now defunct. But, however, the passages in Vattel did by no means go so far as had been argued: for in sections 292, 293, and 295, he expressly distinguished between subsisting and defunct rebellions; and he in no instance recognized the rights of property as still vested in governments which had ceased to exist. This idea was altogether unintelligible; the deductions from Vattel contended for by the other side would lead to the absurdity of attributing to overthrown rebellious governments those rights which were denied to a once-recognized government after it had been conquered or changed. There could be no doubt that the rights of the usurping government vested in the government that succeeded it. Another objection raised was, that a municipal court could not entertain the question now at issue, but that the object must be obtained by treaty with the government of this country; but there had been no authority cited to shew that this Court would not assist a friendly sovereign in recovering his property, and no other government but that of the plaintiff's had ever been recognized by this country. The right of a foreign sovereign to sue had been recognized in many cases, and the principle that a government had a right to repudiate or adopt the acts of a former government, which had ceased to exist, was also laid down in various authorities,

one of which was the famous case of a bond found at Thebes by Alexander the Great, cited in *Puffendorf, De Jure Belli*, lib. 8. c. 6. s. 23, and also referred to in a note to the case of *Barclay v. Russell* (5). The case was this:—When Alexander the Great took Thebes he found an instrument in which it appeared that the Thebans had lent the Thessalians a hundred talents. Alexander gave up the instrument to the Thessalians. The Thebans, upon their restoration by Cassander, demanded the debt. Again, there was the well-known case where Donna Maria of Portugal successfully repudiated certain engagements which had been entered into by Don Miguel. Public monies were always considered as being impressed with a kind of trust, and in the present case the monies being alleged to belong to the plaintiff he could sue for them when misapplied without his sanction. In Sir Thomas Plumer's case, *Taylor v. Plumer* (6), monies were pursued into the hands of a third party; and in *Scott v. Surman* (7) Mr. Justice Willes held, that where acts were done without authority, the person whose authority was necessary had the option of either repudiating the act, or considering the parties taking the benefit of such act as trustees for him. The plaintiff's authority, therefore, being restored, he had a right over all intermediate acts, and might adopt them as far as he thought fit, and it being professedly argued that the purchase was made for public purposes, the plaintiff was entitled to the benefit of it. In the case of *The City of Berne v. the Bank of England* (8) Lord Eldon had laid it down that the acknowledgment of a government was a matter of public notoriety; and hence, as the plaintiff had always been acknowledged by this country as King, there was no doubt as to his title. And in *Wheaton on the Law of Nations*, p. 298, it was stated that courts of justice and private individuals, until the independence of a state had been acknowledged, were bound to consider the ancient state of things as remaining, and the plaintiff's right was further supported by the follow-

(3) Turn. & R. 297.

(4) 2 Sim. 213; s. c. 7 Law J. Rep. Chanc. 65.

(5) 3 Ves. 427.

(6) 3 M. & S. 562.

(7) Willes, 400.

(8) 9 Ves. 347.

ing cases—*Advocate General of Bombay v. Amerchund* (9), *Dolder v. Lord Huntingfield* (10), *Barclay v. Russell, Thompson v. Powles* (11), *Decrees of the House of Commons, May 14, 1660, and 12 Car. 2. c. 31, Foster v. Bates* (12), *The Nabob of the Carnatic v. the East India Company* (13). The defendants were by this bill fixed with a knowledge of the plaintiff's rights. They were well aware that they were dealing with the agents of a usurping government, and it would be a breach of the duties of an ally of a foreign country not to assist the sovereign of that country in recovering his rights. The bill further alleged that a scheme had been entered into by the defendants, with a view to defraud the provisions of the "Ship Registry Act," in order that the real purchasers of the vessel might not be discovered, and this was in accordance with the act of parliament, which declared "that no ship should be deemed to have been duly registered where the whole property was not vested in British subjects." It had been argued, that the vessel was wholly the property of Wilcox and Moody; but the scheme set forth in the bill proved that this was not the case, and if such scheme had in fact been practised, the registry had been effected in fraud of the act, and the ship was in fact held by foreigners, in the name of trustees, and the registry was altogether colourable and contrary to the intentions of the legislature. On the question as to want of parties, it had been argued that the members of the usurping government ought to be made parties to this bill, but this was not a dispute between individuals. The usurping government claimed nothing except as a government; and as they had ceased to exist as a government, the Court could not recognize them.

Mr. Rolt, in reply, said he did not dispute much of the law which had been advanced by the other side, but he dis-

(9) 1 Knapp, 329, n.

(10) 11 Ves. 283.

(11) 2 Sim. 194.

(12) 15 Mee. & W. 226; s.c. 13 Law J. Rep. (N.S.) Exch. 88.

(13) 1 Ves. jun. 371.

puted its applicability to the present case. He contended that the rights of the government of Sicily *de facto* had not been transferred to the present government, so as to create any privity between them and the defendants. It had been argued that the plaintiff, representing the present government, was entitled to the benefit of all the acts of the revolutionary government, which he chose to adopt, although he at the same time repudiated the idea of the government *de facto* having at any time any rights as such. It might be true that one government had ceased to exist and another was established, but the contracts of the defunct government, as between them and third parties, remained intact, and there could be no privity between the present government and those third parties. All that the third parties had to do was to inquire what was the existing government, and it was evident that the plaintiff did not represent the government existing at the time the contract was entered into. There was nothing in any of the cases cited to shew that the property taken by one contending power was not transferred to the conquering party. The plaintiff had, in fact, pleaded the right of war, and why should not the defendants plead the same right, and claim to retain what they had got possession of? The case of the Theban bond would be found more favourable to the defendants than to the plaintiff. It was alleged in this bill that these funds were taken from the royal treasury, but there was no evidence to prove that the money so taken was the property of the King; the Court could not refer to the law of Sicily, and that question could not be determined by the law of this country. It was quite possible that the revenue was not vested in the King, but one of the public officers.

Feb. 7.—THE VICE CHANCELLOR.—In this case I have referred to all those passages which were cited in support of the demurrer of the parties; and I must say it appears to me that the language that has been referred to, which is to be found in *Vattel* and *Puffendorf*, does not apply to the case. There is no case upon the record of belligerent parties. The case

upon the record is the case of a simply told tale, uniform from beginning to end, of a person, an absolute sovereign having a part of his subjects in rebellion against him, who take the opportunity of the state of rebellion to possess themselves of some part of that royal property which belonged to the plaintiff as King, and that he succeeded in putting down the rebellion; and the parties who were in rebellion against him, having made use of their actual power over the royal fund, to send it in the shape of bills and so on to this country, thereby did not acquire any right or property as against their sovereign; and it appears to me an extraordinary thing, after the case of *The Nabob of the Carnatic v. the East India Company* and the case of *Hullett v. the King of Spain*, that there should be any difficulty raised upon the proposition; because it seems to my mind laid down as clear as any proposition can be, that the independent sovereign of a state is competent in this country to sue for his personal rights. That appears to me, therefore, to decide in effect the great question upon this record, and this bill is only constructed for the purpose of following, upon what I may call the doctrine of ear-mark, that property which, having once been taken by the rebellious subjects of the King, was sent by them into this country, in such a manner that, by the doctrine of ear-mark, possession may be traced to certain persons who are defendants upon the record. Then, it appears to me, that, in that respect, the demurrer must be overruled.

Then, as to the objection that was made for want of parties, it does not appear to me that there is any want of parties upon the record. The rebellious subjects certainly are not necessary parties to the record, but those are made parties who, through the instrumentality of the rebellious subjects, while in a state of rebellion, did unlawfully and improperly acquire possession of the King's property.

Then, with respect to the last question, which was made as to the Ship Registry Act, it seems to me that the 38th section has quite a different object in view from that which is contained in the 5th section of the act; and according to the

true construction of the 5th section, no person who is not wholly a British subject can have a right to register. Therefore, it does appear to me, that upon all these grounds, the demurrer must be overruled.

L.C.
1849.
March 24, 30, 31;
April 3, 21.

} PENNY v. WATTS.

Vendor and Purchaser — Constructive Notice—Purchaser for Value without Notice.

R. U. under the will of her late husband being seised of certain real estates, subject to a legacy of 2,000l. to E. S. upon her subsequent marriage with J. W. in 1843 settled these estates to certain uses, whereby they became ultimately vested in J. W. in fee. To a bill by the husband of E. S. claiming under an alleged agreement in writing, in 1835, between R. U. and E. S. whereby E. S. before her marriage agreed to release her legacy, and R. U. in lieu thereof, agreed to assure or devise to her certain parts of the same real estates, J. W. by his answer admitted that, before his marriage with R. U. he was informed by her that by agreement between her and E. S. E. S. had given up her right to the legacy, and in lieu thereof R. U. had left her part of the said estates; but he denied all knowledge of the alleged agreement of 1835, or of any other binding agreement, and insisted that he was a purchaser for value without notice:—Held, that J. W. had that knowledge which should have led him to further inquiry; and was affected with constructive notice of the plaintiff's equitable title under the agreement, if such existed: and the Court directed issues to ascertain the facts.

The plaintiff in this case, in January 1846, filed his bill against the defendant J. Watts and Rebecca his wife, formerly Rebecca Unett, stating, that C. B. Unett by his will, dated in 1821, devised and bequeathed to his wife Rebecca Unett all his real estates in Herefordshire and Shropshire, and all his personal estate absolutely, charged only with the payment of his debts, funeral and testamentary expenses, and

legacies, and amongst others, with a legacy of 2,000*l.* to his niece Elizabeth Stone (afterwards Elizabeth Penny, the wife of the plaintiff) to be paid to her whenever his wife might think proper; that the widow shortly after the testator's death proved his will, and paid his debts, &c., and the legacies given by his will, except the legacy of 2,000*l.* thereby given to Elizabeth Stone; that in 1835 Elizabeth Stone intermarried with the plaintiff, and died in 1836 without issue, and that the plaintiff was her legal personal representative; that on the 8th of December 1843 the defendant J. Watts intermarried with Rebecca Unett, and by a settlement made upon that marriage the devised estates were conveyed to certain uses, and that the legal estate therein had now by virtue thereof become vested in the defendant J. Watts for an estate of inheritance in fee simple. The bill then charged that the defendants at times alleged that Elizabeth Stone in 1831 released her legacy of 2,000*l.* to Rebecca Watts, and that the release became void by failure of consideration for the same; that the defendants at other times alleged that, at a subsequent date, by some instrument in writing, Elizabeth Stone released her legacy to Rebecca Watts in consideration of certain real estate agreed to be conveyed to her and the plaintiff, her then intended husband, by Rebecca Watts, but that no such estate was ever conveyed. The bill then prayed that the legacy of 2,000*l.* might be raised out of the devised estates and paid to the plaintiff.

The defendants by their answer stated that, previous to October 1831, Rebecca Watts and Elizabeth Penny were residing together, and that in that year it was agreed between Rebecca Watts and Elizabeth Penny, that Elizabeth Penny should release to Rebecca Watts her legacy of 2,000*l.*, and that Rebecca Watts by her will should devise to Elizabeth Penny certain real estate of the testator; and that, in pursuance of such agreement, Rebecca Watts by her will, dated in August 1831, devised such estate to Elizabeth Penny; and that Elizabeth Penny by deed released her legacy. The answer also contained the following passage:—"The defendant

Rebecca Watts says that before her marriage with J. Watts she informed him, that by agreement between her and Elizabeth Penny, before the marriage of Elizabeth Penny to the plaintiff, Elizabeth Penny had given up her right to the legacy, and that in lieu thereof Rebecca Watts had devised to her Broadward Hall; but not being versed in matters of law, &c. she did not know by what proceeding or assurance or other means the legacy had been so given up; and the defendant's memory being defective from age, she had altogether forgotten the release; and therefore she was unable to inform and did not inform the defendant J. Watts of it."

Rebecca Watts died in April 1846; and a bill in the nature of a supplemental bill was then filed by the plaintiff against J. Watts and certain other persons who were alleged to have an interest in the devised estates. This bill further alleged that in the year 1835, when a marriage was in contemplation between the plaintiff and his late wife, an agreement was come to between them and Rebecca Watts respecting the legacy and the real estate; that the plaintiff, at the time of filing his original bill, was unable to discover such agreement or to recollect the purport thereof; but that, since the death of Rebecca Watts, the plaintiff had discovered, as the fact was, that Rebecca Watts herself gave instructions to her agent, Mr. Marston, to prepare an agreement for carrying the arrangement into effect; which instructions were taken down in writing, and were altered and finally approved of by Rebecca Watts [the bill then set out the instructions at length]; and that such instructions were duly carried out by a deed, dated the 29th of September 1835, which was duly executed by Rebecca Watts and Elizabeth Penny. That the plaintiff had, since the death of Rebecca Watts, discovered, as the fact was, that J. Watts, previously to and at the time of his marriage, was aware that Rebecca Watts had obtained possession of such deed, and, subsequently to the death of the plaintiff's wife, had destroyed the same. The bill then charged that if for any reason the plaintiff should be deemed not entitled to the hereditaments and premises mentioned in the agreement of 1835, then that the

plaintiff was entitled to the legacy and interest; and that the same was a charge upon the hereditaments comprised in the defendant's marriage settlement.

In the answer of J. Watts to the supplemental bill was the following passage: "That, previously to the marriage of this defendant to Rebecca Watts, he was informed by Rebecca Watts, in a conversation he had with her, and he had ascertained from a perusal of the will of her late husband, that she was entitled to the estates of the testator devised to her by the will; and that this defendant, previously to his marriage, was informed by her in conversation that, by agreement between Rebecca Watts and Elizabeth Penny, Elizabeth Penny before her marriage with the plaintiff, had given up her right to the legacy of 2,000*l.*; and that in lieu thereof Rebecca Watts had left her Broadward Hall; but the defendant says he positively denies that, previously to his marriage, he did by any conversations or conversation, save as aforesaid, or any inquiries or inquiry of Rebecca Watts, or any other person or persons, or by obtaining the perusal of any writings or writing in her or any other person or persons' possession, power or otherwise, make himself acquainted with the state of her affairs or any of them, or her proceedings with respect to the real or personal estate of the testator or the administration thereof, or any such matters, or with the alleged rights or interests of the plaintiff in respect thereof or any of them, or all or any of the particulars in the said bill in this cause untruly alleged respecting the alleged agreement." The defendant, by his answer, insisted that he was a purchaser for valuable consideration without notice, and claimed the same benefit at the hearing of the cause as if he had pleaded that he was such purchaser as aforesaid. By the evidence it appeared that the plaintiff was in the occupation of Broadward Hall at the time of the defendant's marriage with Rebecca Unett, and that he had resided there from the time of his marriage with Elizabeth Stone. A draft copy of the agreement of September 1835 was produced and proved by F. Marston, and the same witness also deposed to the execution of the same agreement,

and its subsequent destruction by Rebecca Watts.

At the hearing, Knight Bruce, V.C. dismissed both bills; and the plaintiff now appealed from that decree.

Mr. Bethell and *Mr. Bazalgette*, for the plaintiff, contended that the defendant had notice of the plaintiff's claim, or, at least, sufficient notice to put him upon inquiry; that there was at least sufficient evidence of the fact of the execution of such agreement for the Court to have sent it to a jury.—

Allen v. Anthony, 1 Mer. 282.

Daniels v. Davison, 16 Ves. 249.

Martinez v. Cooper, 2 Russ. 198.

Barnard v. Pumfrett, 5 Myl. & Cr. 63; s. c. 10 Law J. Rep. (N.S.) Chanc. 124.

Williams v. Lambe, 3 Bro. C.C. 264.

Mr. J. Russell, *Mr. Rolt* and *Mr. Rogers*, for the defendant Watts.—The agreement of 1835 (if it ever existed) amounts only to a contract; but the defendant relies upon a conveyance executed in his favour by Rebecca Watts for valuable consideration—*Tasker v. Small* (1), *Brandlyn v. Ord* (2). The defendant denies notice of the alleged agreement—*Jerrard v. Saunders* (3), *Bowen v. Evans* (4), *Mitford on Pleading*, 274. In *Jones v. Smith* (5), the case of *Daniels v. Davison* is spoken of by Wigram, V.C. as an extreme case.

April 21.—The LORD CHANCELLOR — (after stating the facts of the case).— Upon the subject of the purchase for valuable consideration without notice, there are two points in which it is met. There are two passages, one in each of the answers, which touch upon that question. In the first answer the defendant's late wife says —[His Lordship read the passage from the

(1) 3 Myl. & Cr. 63; s. c. 7 Law J. Rep. (N.S.) Chanc. 19.

(2) 1 Atk. 571.

(3) 2 Ves. jun. 454.

(4) 1 Jo. & Lat. 178.

(5) 1 Hare, 62; s. c. 11 Law J. Rep. (N.S.) Chanc. 83; affirmed on appeal, 1 Phil. 244; s. c. 12 Law J. Rep. (N.S.) Chanc. 381.

first answer set out above]. That is certainly short of an admission of there being a contract to leave the Broadward Hall estate; but there are these two facts put together, namely, that the legatee released her legacy, and that in lieu thereof Rebecca Watts devised the estate in question. In the subsequent answer of the defendant J. Watts, he says—[His Lordship here read the passage from the answer of Watts to the supplemental bill]. The defendant here admits that, previously to his marriage he had notice that the plaintiff's wife had given up her legacy, and that, in lieu thereof, Rebecca Watts had devised to her the estate. These two facts coming to the knowledge of the defendant, namely, the release and the devise in consideration thereof, I think it is not carrying the doctrine of this Court further than it has often been carried to say, that, knowing these facts, you were bound to inquire how they took place, and that knowing these two facts, you cannot afterwards say that you had not that sort of knowledge which would affect you with constructive notice of that which, if the facts be proved, would shew that the plaintiff had an equitable title by contract, to have the estate so devised to his late wife. The case of *Taylor v. Baker* (6) certainly embraces the whole of that proposition. In that case A. made an equitable mortgage to B, and, on giving a subsequent security to C. told him he had given a judgment or warrant of attorney to B. for money borrowed, and it was held that C. having such information, namely, that a judgment or warrant of attorney had been given, was bound to pursue the inquiry further; for, if he had, he would have discovered, as the fact was, that there was an actual security given on the land; and that, having that notice which would lead to further investigation, he could not set up the fact of his being a purchaser without notice. In this case, therefore, if the facts are as stated by the plaintiff, I cannot think that the defendant is entitled to protect himself as a purchaser for valuable consideration without notice. The facts are, however, in a state of the most extraordinary obscurity. Now, I am not in a

situation to dispose of the case upon these facts without further evidence, and being of opinion that the defendant is not entitled to protect himself as a purchaser for valuable consideration without notice, I must have the assistance of a jury in the investigation of these facts before I can exercise the jurisdiction in deciding upon the equity between the parties. I propose, therefore, to direct three issues: first, whether the legacy of 2,000*l.* had been effectually released before the death of Mrs. Watts; secondly, if it had been released, whether such release was given in consideration of Broadward Hall being devised to Mrs. Penny and her heirs; and thirdly, whether the agreement of the 29th of September 1835 had been executed by Mrs. Watts; because, if she executed it, her subsequent destruction of it will not prevent its being binding on those who claim under her.

WIGRAM, V.C.	}	M'CALMONT v. RANKIN.
1849.		
Feb. 14, 15, 16;		
May 23;		
June 5, 6.		
1850.		
Jan. 12, 14, 16, 30; Feb. 7.		

Ship and Shipping—Cargo—Freight—Proceeds of Sale—Lien—Consignment—Bill of Lading—Invoice and Specification—Ship Registry Act, 3 & 4 Will. 4. c. 55.—Inquiry as to Sale—Defendants not Parties to Record, Decree against.

Plaintiffs, a firm in Liverpool, agreed with the English branch and agents there of a colonial firm to accept the agency of, and make certain advances to, the latter, upon consideration of all consignments being made to the plaintiffs. The latter accordingly made large advances, and were advised by the colonial firm of its intention to launch a ship and consign it and the cargo to them, to the credit of the consignors' account with the plaintiffs. Power of attorney to sell the ship on its arrival at Liverpool, executed by the sole registered owner (one of the partners of the colonial firm), specifications and invoice of the cargo and freight signed by the firm, and bills of lading of the cargo to be delivered

to the plaintiffs or their assigns, and signed by the then master of the ship, were duly forwarded to the plaintiffs. The latter, upon the credit of the promised consignment, then made a further large advance to the English agents. The colonial firm subsequently became embarrassed, and previously to the sailing of the ship assigned it, with the cargo and freight, to a second colonial firm, and the latter duly registered the ship in their own names. The second colonial firm very shortly afterwards (having changed the former master) assigned the ship and cargo to a third colonial firm to secure a certain sum, and the ship was duly registered in the name of one of its partners. The third colonial firm retained the new master and consigned the ship and cargo to their own agents at Liverpool (who constituted a firm there consisting of all the members of the third colonial firm, except the then registered owner of the ship), accompanied by power of attorney to sell the ship, and by the usual invoices, specifications, and bills of lading of the cargo to be delivered by the new master to the order of their Liverpool agents. Possession of the ship and cargo on arrival at Liverpool being refused to the plaintiffs, they filed a bill for sale of the ship, declaration of their lien, and for an account against all the members of the three colonial firms (except one member, a partner both in the first colonial firm and the English branch), and the assignees in bankruptcy of the English agents of the first colonial firm, and the master of the ship. None of the defendants, except one, a member both of the third colonial firm and that of its Liverpool agents, had been served with subpoena. The consignees of the third colonial firm sold the ship after the bill had been filed. The Court, at the hearing, refused to make a decree in respect of the plaintiff's claim to the ship in the absence of the registered owner and others claiming an interest in it; but, subsequently, upon the plaintiffs waiving all interest in the ship if unsold, gave them a decree (without prejudice) for an inquiry as to the proceeds of the sale of it: and, on further directions, sent the questions as to the property in the cargo under the bills of lading to the plaintiffs and in the freight, to be tried at law.

The plaintiffs in this suit were merchants and mercantile agents, carrying on busi-

ness at Liverpool in copartnership, under the firm of M'Calmont, Brothers & Co. Hugh Mackay, of Liverpool, and the defendants James Mackay and Daniel Mackay, of St. John's, in New Brunswick, North America, brothers, were merchants and co-partners, carrying on business at St. John's, under the firm of H., J. & D. Mackay, of which H. Mackay was the principal, and J. and D. Mackay were the managing partners. H. Mackay and Archibald Fraser Mackay (also brothers) carried on business at Liverpool and Glasgow until September 1841 in copartnership, under the firm of "Mackay Brothers," of which H. Mackay was the principal and managing partner. This firm acted as the agents and correspondents of the firm of H., J. & D. Mackay, and was a branch of it. H. Mackay was also proprietor of certain mills at St. John's, and a great part of the business of the firm of H., J. & D. Mackay consisted in the purchase and export of timber prepared at those mills for exportation. The defendants T. P. Crane and J. M'Grath were in partnership at St. John's, under the firm of Crane & M'Grath. James Mackay and M'Grath were brothers-in-law of Crane. The defendants, Robert Rankin, of Liverpool, John Pollok, of St. John's, J. Pollok, A. Pollok, and A. Gil-mour, of Glasgow, and A. Rankin, of Miramichi, in British North America, were merchants and co-partners, carrying on business at St. John's under the firm of Robert Rankin & Co., conducted there by John Pollok. All the last-mentioned defendants, with the exception of John Pollok, of St. John's, also carried on the business of merchants in co-partnership at Liverpool, under the firm of Rankin, Gil-mour & Co.

In February 1841 H. Mackay on behalf of the firms of H., J. & D. Mackay and of Mackay Brothers entered into the agreement with the plaintiffs contained in the following letters:—

"Liverpool, Feb. 1, 1841.

"Messrs. Mackay Brothers present.

"Dear Sirs,—In reference to the conversation lately had with your Mr. Hugh Mackay, and in compliance with his request, we are now willing to accept the agency of your house at St. John's, New Brunswick, on the following basis, namely, that you

shall gradually wind up your establishment here, and remove to Glasgow, completing the same, if required, within six months from this date. That all business coming in to you after this date, as well as all shipments of supplies required by your St. John's firm, shall be transferred to us as your agents. That your establishment at Glasgow shall be considered as a branch of the St. John's house, and confined in its operations to the agency of the same, with the exception of any commission business you may have acquired since you have been established here, and which you may wish to retain, it being, however, hereby understood that you will not enter into any speculations whatever without our concurrence. That we will grant you an open credit for 10,000*l.* sterling, of which only 5,000*l.* to be at present available, the remainder, on deposit with us of a valid legal and first mortgage of property at St. John's, consisting of two mills and appurtenances thereof, situate at Indian Town, and stated by you to be worth upwards of 15,000*l.*, which valuation is to be fully established to our satisfaction. This mortgage to contain full power of sale, and to be considered as security not only for the amount of the aforesaid credit, but also for any further balance of general accounts, let the said balance arise from any or whatever transactions our connexion with you as agents may lead us into; and the said mortgage to be an available security at any period of the account. That commission on the account shall be charged as agreed upon. That we are not to be under a heavier cash advance at any period than 5,000*l.*; and with a view to make this the easier, we will consider you entitled to credit in your general account for probable nett proceeds of all consignments not realized, and for bills of lading in hand of all forthcoming property. That we shall have the full and absolute controul by sale, or otherwise, of all consignments on your account whenever we may think proper for our reimbursement, without reference to market rates. That insurance against fire risk shall be effected at your cost on the mortgage property, &c. If you approve of the same, please hand us in a letter to that effect.

Signed, "M'Calmont Brothers & Co."

NEW SERIES, XIX.—CHANC.

"Liverpool, Feb. 16, 1841.

"Messrs. M'Calmont Brothers & Co.

"Dear Sirs,—We have now before us your favour of the 1st inst. relative to our retiring from business in Liverpool and going to Glasgow, or some other part of the United Kingdom, to establish ourselves there, and your accepting the agency thereof here and of our St. John's house. We agree to the contents of your letter as above; but have to remark, that we understand you do not wish to preclude us from doing any commission business not requiring capital, such as sales of consignments without advances, forwarding of goods, chartering of vessels, &c. And from the conversation had with you, we shall not expect you to be rigid if any expense is incurred in consequence of your undertaking to ship those supplies, &c. which we were not anxious for you to do at present. No doubt all will go on smoothly and satisfactorily to both parties.

Signed, "Mackay Brothers."

The plaintiffs accordingly opened an account with the firm of Mackay Brothers, and commenced the business of their agency, received remittances and consignments, and made large advances thereon. The mortgage mentioned in the letter of the plaintiffs was subsequently effected by indenture of the 17th of April 1841, duly executed by all the individual members of the firms of H., J. & D. Mackay and Mackay Brothers.

In June 1841 the plaintiffs were informed by the firm of H., J. & D. Mackay that the latter intended to launch the barque *Miracle*, and to send it with a cargo of timber to Liverpool, consigned to the plaintiffs as a consignment to the credit of their account. The advances made by the plaintiffs amounted at that time to 14,467*l.*, and on the faith of such consignment being made, the sum of 1,500*l.* was in July 1841 advanced by them upon the said security to the firm of Mackay Brothers.

The plaintiffs duly received from the firm of H., J. & D. Mackay two letters, dated the 31st of July 1841, a power of attorney to sell the *Miracle*, and the invoice, specifications and bills of lading of her cargo. The power of attorney was dated at St. John's the 29th of July 1841, and executed by James Mackay, the sole regis-

tered owner of the *Miracle*. It recited the certificate of registry of the ship, and constituted one of the members of the plaintiffs' firm his attorney, to sell it. The specifications and invoice of the cargo were dated the 31st of July 1841, and signed H., J. & D. Mackay. In the invoice the value of the timber and the freight to Liverpool (1,000*l.*) were entered at 2,229*l.* 17*s.* 3*d.*; the ship (567 tons at 9*l.* 10*s.* per ton) at 5,386*l.* 10*s.*; total, 7,616*l.* 7*s.* 3*d.* The bills of lading of the same date (31st of July 1841) were signed by Thomas Benson, the then master of the *Miracle*, and expressed that the cargo was to be delivered to the plaintiffs or their assigns, but did not mention the freight. The letters accompanying the above were as follows:—

St. John's, New Brunswick,
July 31, 1841.

"Messrs. M'Calmont Brothers & Co.

"Dear Sirs,—We now beg to hand you seconds of exchange amounting to 788*l.* 5*s.* 8*d.*, firsts of which we forwarded by last mail. We now also hand you firsts of exchange amounting to 769*l.* 9*s.* 9*d.*, also power of attorney to sell the ship *Miracle*.—Yours truly,

"H., J. & D. Mackay."

St. John's, July 31, 1841.

"Messrs. M'Calmont Brothers & Co.

"Dear Sirs,—We now hand you invoice and bill of lading and specification of the cargo, per barque *Miracle*, to your address. Amount as per invoice 7,616*l.* 7*s.* 3*d.* sterling, which we hope will arrive to a good market, referring you to Mackay Brothers as to insurance.

(Signed) "H., J. & D. Mackay."

After the remittance of the power of attorney, bills of lading, invoice and specifications, the firm of H., J. & D. Mackay became embarrassed and were much pressed by their creditors. They received from Mackay Brothers a letter dated the 19th of July 1841, from Liverpool, containing the following extracts:—

"We have all your letters up to the 30th ult. with discounts and bills inclosed to amount of 5,625*l.* 1*s.* 3*d.*, the first you sent to M'Calmonts, and we believe they were all duly accepted. Duncan Brothers have stopped payment, together with several bankers and merchants both in

Manchester and London, with also a little in Liverpool. In consequence of Duncan's failure M'Calmont will not accept our bills for the sums you sent, and they owe us about 500*l.* under terms of mortgage for the property, so that now their debt is reduced, say to 4,000*l.* or thereabouts."

"We advise you in eight or ten days after you receive this or before the arrival of the next packet, to put your business into the hands of respectable trustees, for the benefit of all the creditors on this side of the water, and on your side. See that this is properly understood, because as it stands now, you have all the property and we are mere acceptors, and we shall advise you from time to time what to do. Send your remittances in future to us and not to M'Calmonts."

H., J. & D. Mackay then made over the ship to Crane & M'Grath (who were registered at St. John's as the owners on the 5th of August), and assigned the cargo and freight to them.

On the 19th of August 1841, Crane & M'Grath executed a bill of sale of the *Miracle* to John Pollok, as managing partner of the firm of Robert Rankin & Co., and on the following day (August 20th) John Pollok at St. John's was registered as the sole owner of the ship. On the 19th of the same month Crane & M'Grath delivered to Robert Rankin & Co. the invoice and bill of parcels or bought note of the *Miracle* and cargo, as follows:—

"Messrs. Robert Rankin & Co.	
Bought of Crane & M'Grath ship	
<i>Miracle</i> as she now lies in the harbour	
of St. John's, and now ready for sea,	
567 tons register, with all her tackle	
and apparel complete, as per bill of sale	
	£ 4,000
Cargo, per ship <i>Miracle</i> , now on board	
and ready for sea, as per invoice, say for	1,200
	£ 5,200
Creditors, by payment in full as follows:—	
R. Rankin & Co.'s note of this date at six	
months	£ 4,000
By sum charged them in account, as per	
their receipt therefore	1,200
	£ 5,200

(Signed)

"Crane & M'Grath,

"St. John's, August 19, 1841."

The consideration given for the ship was the promissory note of Robert Rankin & Co., dated the 19th of August 1841, for

4,000*l.* currency, payable six months after date, with leave for Crane & M'Grath to draw it before maturity, as Robert Rankin & Co. might be able conveniently to pay, and the consideration given for the cargo was by a credit to the amount of 1,200*l.* currency in the books of Robert Rankin & Co. to the account of Crane & M'Grath. John Pollok duly transmitted to Rankin, Gilmour & Co. a power of attorney of the 21st of August to sell the ship, and bills of lading of the 20th of the same month, directing the cargo to be delivered to their order. The *Miracle* sailed from St. John's about the 21st of August, and arrived at Liverpool on the 29th of September 1841. On the 21st of September 1841 a fiat in bankruptcy was issued against the firm of Mackay Brothers. On the arrival of the *Miracle* at Liverpool possession of the ship and cargo was demanded on behalf of the plaintiffs, and refused by the then master, Henry Bacon, who had been substituted for Benson by Crane & M'Grath, and retained as master by John Pollok. The plaintiffs then applied to the firm of Rankin, Gilmour & Co. upon the subject, and received the following reply:—

“Liverpool, Oct. 2, 1841.

“Messrs. M'Calmont Brothers & Co.
Liverpool.

“Gentlemen,—In answer to your letter just handed to us we have only to say that the ship *Miracle* and her cargo were bought from Messrs. Crane & M'Grath and fully paid for by our friends Messrs. Robert Rankin & Co., St. John's, and that we or they know nothing of either you or Mackay, and will allow no interference whatever.

(Signed) “Rankin, Gilmour & Co.”

On the 14th of October 1841 the present bill was filed by the plaintiffs against the above-mentioned defendants (all of whom, except Robert Rankin, were out of the jurisdiction of the Court), Bacon, the master of the *Miracle*, and the assignees of Mackay Brothers. It alleged that the sales and transfers of the ship and cargo to Crane and M'Grath, and by them to John Pollok, were the result of a scheme devised between them and H., J. & D. Mackay for the purpose of defrauding the plaintiffs and depriving them of the benefit of the power of attorney and consignment previously

made to them; that Crane and M'Grath had not given any good or valuable consideration for the sale and transfer of the ship and cargo; and that Rankin, Gilmour & Co. had, through the firm of Robert Rankin & Co., of which John Pollok was managing partner, constructive notice of the plaintiffs' lien and claim on the ship, cargo and freight. It prayed for a declaration that the transfers and sales of the ship and cargo were fraudulent and made for the purpose of defrauding the plaintiffs; for delivery up to them of the ship, cargo, certificate and papers; for execution of a proper transfer or bill of sale to them; or for sale of the ship by the Court, and declaration that the plaintiffs had a lien upon the proceeds of such sale for what balance might be found due to them on their account; or if the ship and cargo or either had been sold, for an account of the proceeds and declaration of lien as aforesaid; but if the Court should be of opinion that the subsequent transfers and sales had deprived the plaintiffs of their claim upon the ship, freight and cargo, or either of them, then for a declaration that they had a lien for their balance on the nominal or ostensible considerations given for the ship and cargo, and an order for payment of such balance; for an account between the plaintiffs, and H., J. & D. Mackay and Mackay Brothers; and for an injunction (which was afterwards refused by the Master of the Rolls) to restrain the sale of the ship and cargo by the firm of Rankin, Gilmour & Co.

Robert Rankin, by his answer, denied all knowledge or belief of the existence of the alleged fraudulent scheme, or notice of the claims of the plaintiffs, and stated that according to his information and belief the ship and cargo had been made over to Crane & M'Grath by H. J. & D. Mackay, in consideration of the former having accepted bills of exchange drawn upon them by the latter to the amount of 16,000*l.* and upwards. He also stated that, by an understanding between the firms of Robert Rankin & Co. and Crane & M'Grath, the surplus, if any, of the proceeds of the ship and cargo, beyond the respective sums of 4,000*l.* and 1,200*l.*, was to belong to the latter firm. This defendant further stated that it was

his intention to sell the ship as soon as he could.

The Solicitor General and Mr. Cairns, for the plaintiffs.—Under the circumstances stated in the bill, the letters of February 1841, the transmission by H., J. & D. Mackay of the power of attorney to sell the ship, and of the bills of lading, invoice and specification of cargo, constituted in equity an agreement between them and the plaintiffs that the *Miracle* should be sold to the latter, and the proceeds received and carried by them to the credit of the account of the former in reduction of the balance due by them to the plaintiffs. The Mackays could not, after the bills of lading, invoice, specifications and power of attorney had been remitted to the plaintiffs, and advances had been made by the latter on the faith of the consignment, sell, charge, or vary the destination of the ship, or dispose of the freight, without committing a breach of faith and practising a gross fraud upon the plaintiffs. Neither had the Mackays any lawful power to revoke or recall the bills of lading after they had been made out, signed and remitted, and advances made as above stated—*Haille v. Smith* (1), *Anderson v. Clark* (2), *Bryans v. Nix* (3). The power of attorney to sell the ship being coupled with an interest was irrevocable by James Mackay—*Gausson v. Morton* (4). The plaintiffs had a lien on the ship's papers for which an action of trover would lie—*Mestaer v. Atkins* (5). Their claim being merely in respect of the proceeds of the sale of the ship, and not in respect of the ship itself, it was not affected by the non-registry of the ship in their names under the Ship Registry Act in force in 1841 (6); at least none of the cases went to that length—*Mestaer v. Gillespie* (7), *Davenport v. Whitmore* (8), *Sharp v. Taylor* (9),

Abbott on Shipping, p. 333, 7th edit. The claim of the plaintiffs to the proceeds of the sale of the ship, of which they were not the legal registered owners, was analogous to the claim of aliens to the proceeds of the sale of real estate. Aliens could not hold land, but they might take the purchase-money of it—*Du Hourmelin v. Sheldon* (10), *Burney v. Macdonald* (11). The case of *Malcolm v. Scott* (12) was an authority (although there the lien claimed was not proved) that the present bill was properly framed for relief in respect of the proceeds in the hands of Rankin, Gilmour & Co.

Mr. Wood and Mr. Tillotson, for the defendant, Robert Rankin.—The plaintiffs had not shewn any title to the ship, freight, or cargo. The firm of Robert Rankin & Co. purchased the cargo without notice of the plaintiffs' claim. John Pollok was entitled to the freight as the registered owner of the ship. The remedy of the plaintiffs, if any, was at law, by an action of trover. They had not proved that they had made any advances on the consignment; on the contrary, they appeared to have repudiated the agreement by their non-acceptance of the Mackays' drafts on the failure of Duncan Brothers.

[WIGRAM, V.C.—That would depend upon the state of the accounts between them at that time, and whether it was such as would justify the non-acceptance by the plaintiffs under the condition in the agreement.]

The plaintiffs, at all events, could not have any title to the ship unless they were registered as the owners. Their case was not within *Davenport v. Whitmore* or *Sharp v. Taylor*. The master of the ship having been changed, and a new bill of lading given to Rankin, Gilmour & Co., the plaintiffs could not claim the cargo as against them—*Michel v. Ede* (13). The ship was registered in the name of James

(1) 1 Bos. & P. 563.

(2) 2 Bing. 20.

(3) 4 Mee. & W. 775; s.c. 8 Law J. Rep. (N.S.) Exch. 137.

(4) 10 B. & C. 731; s.c. 8 Law J. Rep. K.B. 313.

(5) 5 Taunt. 381.

(6) 3 & 4 Will. 4. c. 55. ss. 31, 34.

(7) 11 Ves. 621.

(8) 2 Myl. & Cr. 177; s.c. 6 Law J. Rep. (N.S.) Chanc. 58.

(9) 2 Ph. 801.

(10) 1 Beav. 79; 8 Law J. Rep. (N.S.) Chanc. 133; s.c. nom. *Du Hourmelin v. the Attorney General*, 4 Myl. & Cr. 525; 9 Law J. Rep. (N.S.) Chanc. 25.

(11) 15 Sim. 6.

(12) 3 Hare, 39; s.c. 14 Law J. Rep. (N.S.) Chanc. 57.

(13) 11 Ad. & E. 888; s.c. 9 Law J. Rep. (N.S.) Q.B. 187; 3 P. & D. 513.

Mackay only; and therefore the plaintiffs were not entitled to an account in respect of the proceeds of it as against the partners of the registered owner—*Battersby v. Smyth* (14).

Mr. Hetherington, for the assignees of the Mackays, asked for costs.

The Solicitor General replied.

[Counsel went into an argument of considerable length in respect of the allegations of fraud contained in the bill. The plaintiffs attempted to shew that the defendant Rankin had constructive notice of their claim; and the latter insisted that, in the absence of proof of fraud, the plaintiffs could not on merits sustain a bill founded upon allegations of fraud. In consequence of the absence of the other defendants, the Vice Chancellor did not record his judgment on this branch of the case. The following authorities upon it were cited:—

Langley v. Fisher, 9 Beav. 90; s. c.

14 Law J. Rep. (N.S.) Chanc. 302.

Blair v. Bromley, 2 Ph. 354; s. c. 16

Law J. Rep. (N.S.) Chanc. 105, 495.

Glascott v. Lang, 2 Ph. 310; s. c. 16

Law J. Rep. (N.S.) Chanc. 429.

Wilde v. Gibson, 1 H. L. Cas. 605;

s. c. *nom. Gibson v. D'Este*, stated

in *Sir E. Sugden's Treatise on the Law of Real Property*, &c. p. 614.]

May 23.—WIGRAM, V.C.—I cannot understand how the Court can make a decree in the absence of John Pollok. A similar observation applies, and scarcely with less force, to all parties having or claiming any interest in the proceeds of the sale of the ship *Miracle* and her cargo. If a decree can be made in the absence of these parties, or any of them, upon proof that they are out of the jurisdiction, no proof, upon which I can act, has been given. With respect to the last point (the absence of proof), I apprehend it is well defined that the admission of one party in the cause is insufficient to bind another party. Now, in this suit the first thing I have to determine is, whether the plaintiffs have the lien which they claim as against the *Miracle* and her cargo, or either.

(14) 3 Mad. 113.

Regularly, I cannot do this, except in the presence of the parties claiming an interest in the *Miracle* or her cargo. I cannot, in the absence of such parties, determine that the *Miracle* or her cargo is liable to the claim of the plaintiffs, or, which is in substance the same question, the amount, if any, for which either is liable. I might, perhaps, in a case of necessity, consider John Pollok as represented by the defendant, Robert Rankin, for the mere purpose of taking an account; but it is impossible, in this case, as I view it, to dispense with John Pollok or the other parties who say the ship belongs to them. *Browne v. Blount* (15) and *Kirwan v. Daniel* (16) appear to me to apply to this case. It is obvious here that the defect may be got rid of easily, and without much delay, if the parties whose interests are the same with Robert Rankin's, and who have not been served with subpoenas, will instruct counsel to appear for them at the hearing, and if the plaintiffs will consent that they should so appear, and that the suit should proceed as if they were actually here.

With respect to the case of *Crane & M'Grath*, if they have any interest in the *Miracle* and cargo depending on the alleged invalidity of the sale by the Mackays to them, and of their sale to other parties, they (*Crane & M'Grath*) will be necessary parties to this suit. If they claim no such interest, and have been made parties in respect of the plaintiffs' claim upon that interest, and if the Rankins or the persons interested are parties, a waiver of their interest will remove the difficulty.

The cause was then ordered to stand over, in order that John Pollok might be made a party, or reasons given why he should not be made a party.

June 5.—*The Solicitor General* and *Mr. Cairns* asked for a preliminary inquiry as

(15) 2 Russ. & M. 83; s. c. 9 Law J. Rep. Chanc. 74.

(16) 5 Hare, 493; s. c. 16 Law J. Rep. (N.S.) Chanc. 191 (on demurrer). Wigram, V.C. refused, at the hearing, to make the decree prayed for by the bill, upon the ground that John Francis Kirwan (a defendant residing at Montserrat, and through whom the plaintiffs' equity under an alleged agreement between him and the other defendants arose) was not a party to the record.—April 24, 1849.

to what had become of the ship, similar to that ordered in *Sharp v. Taylor*. If the ship should have been sold, the cause might come on for further directions and a decree obtained. Robert Rankin had declined the opportunity offered him of appearing for his partners, who were abroad. In respect of the absence of John Pollok they cited—

Cowslad v. Cely, Prec. Ch. 83.

Darwent v. Walton, 2 Atk. 510.

Mr. Wood and *Mr. Tillotson* opposed the application.—The transaction between *Crane & M'Grath* and the *Rankins* was not a sale, but a mortgage of the ship and cargo. The proposed inquiry would be useless if the ship had been sold, except for the purpose of attaching the proceeds; but if the money belonged absolutely to John Pollok, a decree would not bind him in his absence. If Pollok should be brought here by supplemental bill, could the Court decide the question of the proceeds in the absence of the other partners? Would not Pollok have a right to file a bill against Rankin, Gilmour & Co. for an account of the proceeds? *Sharp v. Taylor* was not applicable.

June 6.—WIGRAM, V.C.—In this case, the plaintiffs claim a lien on a ship, and the sole registered owner of it (John Pollok) is out of the jurisdiction of the Court. Supposing the ship to have been sold, then the plaintiffs claim a lien on the proceeds of the sale of the ship. It appeared to me at the hearing, supposing the ship to be unsold, which the bill represents was the case at the time the bill was filed, that I could not proceed in the absence of John Pollok, who was out of the jurisdiction; and after consideration I am satisfied that this is the inevitable conclusion to which I must come. Assuming that the plaintiffs were creditors on the Rankins' firm, and also that they would be entitled to have the ship sold, it appeared to me that if I ascertained their right to the debt and to have the ship sold, I could not go on to enforce the decree in the absence of John Pollok. Since I gave my opinion and ordered the cause to stand over to make John Pollok a party, or that reasons might be stated why he should not be made a party, it has been suggested

that I might at all events direct an inquiry as to what has become of the ship, and if it appeared that the ship has been sold and the proceeds of the sale had come into the hands of Rankin, Gilmour & Co. I might proceed to apply those assets to pay the plaintiffs' debt in the absence of John Pollok, Robert Rankin being a partner in the firm of which the plaintiffs claim to be creditors. I do not mean to give an opinion adverse to that view of the case. I might so deal with the case if I had the parties here. The way the case stands at this: the bill does not represent that the ship has been sold, but only suggests that it has been sold the proceeds of which are to be brought into court. What is now asked to do, is to direct an inquiry which, if answered in one way, would enable the Court to proceed; but if answered in the other way, would leave the case in precisely the difficulty it stands at the hearing of the cause. Now, I have invariably acted on the rule not to direct an inquiry of a speculative kind merely for the purpose of avoiding a difficulty which could only be avoided by one way of answering the question. Unless the plaintiffs know the ship has been sold, they will waive all interest in it if it remains unsold, so as to avoid every difficulty which appears to me I cannot alter the course made.

The Solicitor General, on behalf of the plaintiffs, consented to waive all interest in the ship if unsold, and to take the case without prejudice to any question which might arise in the cause.

It was, therefore, ordered to be referred to the Master to inquire and state whether or not the ship had been sold, and if so, by whom and when, and for what sum of money, and whether the proceeds of such sale had been received by or applied on account of or for the benefit of Robert Rankin & Co., and Robert Gilmour and Co. or either of such parties, with liberty for the Master to state the circumstances specially; parties to appear on all deeds, &c. on oath, and to be examined on interrogatories; further directions as to costs reserved; liberty to apply; decree to be without prejudice.

The Master reported on the 9th of August 1849, that he found by the admission of all parties that the *Miracle* was sold on the 28th of February 1843 by the firm of Rankin, Gilmour & Co. under the power of attorney from John Pollok, for 3,000*l.* and that they had received that sum on account of and had accounted for it (less 120*l.* for commission) to the firm of Robert Rankin & Co.

Jan. 12.—The cause came on for further directions.

The Solicitor General and Mr. Cairns, for the plaintiffs.

Mr. Wood and Mr. Tillotson, for the defendant, Robert Rankin (17).

Jan. 30.—WIGRAM, V.C. delivered the following judgment.—The case has been before me on several occasions with respect to the interest of the plaintiffs in the barque *Miracle*, or in the proceeds of the sale of it. If the owner of a ship, being indebted, gives to his creditor a power of attorney to sell and transfer the ship, to receive the proceeds, and apply them in payment of his debts, and if the ship is sold and transferred under the power, I see no reason arising out of the policy of the Ship Registry Act why the creditor should not be allowed to claim the purchase-money in the hands of the purchaser. And in the like manner, if the owner of a ship should agree with his creditor that if he, the owner, should sell the ship while the debt was unpaid, he would give the creditor notice of the sale, and allow him to receive the purchase-money, and if the owner of the ship should sell her, I see no reason why the creditor should not be allowed to enforce the lien against the purchase-money for the ship in the hands of the purchaser. In the cases supposed, the Court cannot be called on to recognize in the creditor any interest in the ship itself. Without saying whether I am right or not in the above suggestion I will, for the present, assume that I am right. The consequence will be that after the registry of the *Miracle* in the names of Crane & M'Grath the plaintiffs might

(17) The greater part of the argument at this stage of the proceedings was heard by the Vice Chancellor in His Honour's private room.

have claimed a lien on such parts, if any, of the purchase-money remaining in the hands of Crane & M'Grath as would be payable by them to the Mackays. It would not be so in fact, because they claim an antecedent debt or bill of exchange. I mean that it would be so in principle. But this will not be sufficient for the plaintiffs' purpose. Crane & M'Grath are not before the Court, and the plaintiffs have to establish that the lien which, by the hypothesis they might have enforced against the purchase-money in the hands of Crane & M'Grath may also be enforced against the purchase-money in the hands of John Pollok, and, through him, in the hands of the Rankins, who are parties to this suit. This branch of the plaintiffs' argument must be noticed in detail, and I shall begin by assuming that the sale and transfer of the *Miracle* by Crane & M'Grath to John Pollok was a *bond fide* sale, and that John Pollok had no notice of the plaintiffs' interest or claim in the proceeds of the sale of the *Miracle*. In this view of the case it cannot be, I think, contended with effect that the plaintiffs could have any lawful claim against Pollok or the Rankins, who are parties to the suit in respect of the proceeds of the sale of the *Miracle*.

The next supposition I shall make is that the sale and transfer of the *Miracle* by Crane & M'Grath to Pollok was a *bond fide* sale, except that John Pollok had notice of the transactions between the Mackays and the plaintiffs, and of the plaintiffs' claim (founded on those transactions) on the proceeds of the sale of the *Miracle* in the hands of Crane & M'Grath. In this case also, as in the last case, it cannot, I think, be contended with effect that the plaintiffs could have any lawful claim against John Pollok or the Rankins, who are parties to the suit in respect of the proceeds of the sale of the *Miracle*.

The distinction between the two cases must depend entirely on John Pollok's notice, which, in my judgment, will not alter the case. In equity notice affects a legal right only where the legal right of one party has deprived another of some right which he otherwise would have had; but that is not the case here. Crane &

M'Grath (by the supposition) acquired an absolute title to the *Miracle* by the registry of it in their names. The plaintiffs' equity, if any, attached on the purchase-money only, and not on the ship. Pollok became the owner of the ship, but did not touch the purchase-money in the hands of Crane & M'Grath. The argument therefore for the plaintiffs must be, that their equity would extend to Pollok's purchase-money as well as to that of Crane & M'Grath, for they can have no better ground for attaching the ship in his hands than in the hands of Crane & M'Grath. Now, it is impossible to contend that the plaintiffs not having any equity as against the ship in the hands of Crane & M'Grath or of Pollok, can have any equity as against Pollok's purchase-money. In fact, Pollok in taking the ship has taken that in which the plaintiffs have no interest. The difficulty in the plaintiffs' way to obtain relief against Pollok in either of the above hypotheses was, I suspect felt, by the counsel who drew the bill, for it contains charges framed with great care and accuracy, for the purpose of shewing that the purchase of Crane & M'Grath, and that by Pollok from them, were the result of a single scheme of fraud concocted by the Mackays, Crane, M'Grath and Pollok, for the purpose of defrauding the plaintiffs. The effect of these charges, if established, would or might be to place Pollok in the situation in which, by the above hypothesis, Crane & M'Grath stand with respect to the purchase-money; and as the *Miracle* has since been sold by Pollok, and the purchase-money is in the hands of the Rankins, who are parties to the cause, the plaintiffs have claimed a right to attach it in their hands.

The first question to be considered is, whether the imputed scheme of fraud is made out. To this I think the answer must be in the negative. Crane and M'Grath and John Pollok are not parties to the suit. The Rankins, against whom the relief is sought, deny the imputation. According to the evidence, the proposal to sell the *Miracle* to Crane & M'Grath originated with the Mackays. The *Miracle* was registered in the names of Crane & M'Grath, and they endeavoured to raise money upon it from one Wiggins,

and it was not until Wiggins had refused to advance money that the application was made to Pollok. At all events, the onus of proving the imputed fraud lies upon the plaintiffs, and they have not proved it. Notice to Pollok of the plaintiffs' claim, if such notice were proved, would not, as I have already said, affect this question. The bill, I think, must fail so far as it respects the ship and the proceeds of the sale of it.

Next, as to the cargo. At the time when the cargo arrived in this country the plaintiffs were creditors of the Mackays to an amount exceeding 14,000*l.*, and under the agreement of the preceding month of February it is impossible to deny that the plaintiffs were entitled to have the cargo consigned to them. This is independent of the question, whether advances to some amount were not made by the plaintiffs upon the security of the specific cargo, which, according to the evidence before me, must I think be taken to have been the case. But the question at law will, I think, be the same whether the balance due to the plaintiffs was in fact made up in part of the advances on this cargo or was advanced generally under the agreement of the 16th of February 1841. The question is, whether the property in the cargo did not vest in the plaintiffs under the bill of lading of the 31st of July 1841 and the documents which accompanied it, so as to deprive the Mackays of the power to alter the destination of the cargo. This is purely a question of law, but it arises in a suit in which this Court has undoubted jurisdiction to decide. I am prepared to give my opinion upon this point; but if either party desires the case to be decided at law rather than that I should decide it adversely against such party, I will put the case in a train for legal adjudication.

If the second question goes to law, the question of the freight, as to which I am not free from doubt, may be tried in the same proceeding (18).

(18) Feb. 7. The bill, so far as it related to the ship, was ordered to be dismissed, with costs, but not to be taxed until further order, and the defendant Rankin elected to try the questions of the plaintiffs' claim on the cargo and freight by an action at law on certain admissions.

M.R. 1849. Nov. 23; Dec. 4, 5, 6, 7, 8. 1850. Jan. 12.	}	SALOMONS v. LAING.
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*Railway Company—Capital—Dividends,
Application of—Demurrer.*

Five railway companies were amalgamated by act of parliament, under which the amalgamated company became entitled to 2,033 shares in the Direct L. and P. Railway Company. The amalgamated company subsequently subscribed for and obtained other shares in the Direct L. and P. Railway Company, which were taken in the names of three of the directors of the amalgamated company. The directors of this company, in concert with the directors of the Direct L. and P. Railway Company, afterwards formed a plan for the purchase of a portion of the line of the Direct L. and P. Railway Company, the remainder of which had, as alleged, been abandoned. Upon demurrer for want of equity and for multifariousness,—Held, that railway companies are bound to apply the monies authorized to be raised by act of parliament for the purposes directed by the act, and that after setting apart sufficient to meet contingencies, the surplus may be divided among the shareholders; that dividends belonging to shareholders may be applied by them severally, but that neither the company nor any assemblage of shareholders have any right to dispose of the portion of any shareholder in general dividends without his consent; that any dealing with the capital of the company not authorized by the act of parliament is illegal, and relief may be given in this court; that a company having lawfully obtained shares in another company forms no reason why such company should purchase other shares in the same company, and divert the funds of the company from the purposes for which they were raised, for the support of another company, and the demurrer for want of equity was overruled.

Held, also, that the allegations in the bill relating to the purchase of that part of the Direct L. & P. Railway which passed from E. to L. and the purchase of the shares in the Direct L. and P. Railway Company were distinct, and that no relief could be

given upon the two transactions in one bill, and the demurrer for multifariousness was allowed, and leave given to amend the bill.

This bill was filed by David Salomons, on behalf of himself and all other proprietors of shares in the London, Brighton and South Coast Railway Company, against Samuel Laing, Leo Schuster, William Cash, since deceased, Charles Sedgfield Crowley, Edward Crowley, George Frederick Hotham, John Lawrie, since deceased, John Nix, James Wishaw, the London, Brighton and South Coast Railway Company, William Arthur Wilkinson and the Direct London and Portsmouth Railway Company. The bill stated that an act, 5 & 6 Will. 4. c. x., was passed for making a railway from Croydon to join the London and Greenwich Railway, to be called the London and Croydon Railway Company, under which they were authorized to raise money to carry out the powers given to them by that and also by other acts of parliament relating to the company.

That an act was passed 7 & 8 Vict. c. xcii. for making a railway from the London and Croydon Railway at Croydon to Epsom, to be called the Croydon and Epsom Railway Company, under which they were authorized to raise money for the purposes of the undertaking.

By another act, 7 & 8 Vict. c. xcvi., the London and Croydon Railway Company purchased the Croydon and Epsom Railway, which, with all the rights, powers and privileges of the company, was transferred to the London and Croydon Railway Company.

That an act, 7 Will. 4. & 1 Vict. c. cxix., was passed for making a railway from the London and Croydon Railway to Brighton, with branches to Shoreham, Newhaven and Lewes, to be called the London and Brighton Railway Company, and they were authorized to raise money for the purpose of the undertaking.

That an act, 8 & 9 Vict. c. cxiii., was passed for making a branch railway from the London and Brighton Railway to or near to the town of Horsham in the county of Sussex, which the London and Brighton Railway Company were empowered to make and maintain.

That an act, 9 & 10 Vict. c. cclxxxiii., was passed to consolidate and unite the London and Brighton and the London and Croydon Railway Companies, and the undertakings belonging to them. And after reciting the above stated acts, and reciting that the London and Brighton Railway Company had purchased the Brighton and Chichester Railway, and all the powers and privileges given to the company; and after reciting that it would be advantageous to the public and also to the proprietors and shareholders of the several railway companies above mentioned if the several undertakings authorized by the several above-mentioned acts were consolidated, and if the said several companies interested in the same were incorporated into one company; the bill stated the 1st, 2nd, 4th, 5th, 6th, 22nd, 23rd, 24th, 26th, 31st, 36th, 37th, and 38th sections of the act which incorporated the several companies, by the name of the London, Brighton and South Coast Railway. It also stated that the plaintiff was the holder of divers shares in the several undertakings, which he had exchanged for forty-eight shares in the consolidated lines, and that he had purchased 100 other shares in the company.

That an act, 9 & 10 Vict. c. cc., was passed to incorporate the Brighton, Lewes and Hastings Railway Company to make a railway to be constructed in the county of Kent, and to extend in the county of Kent, from Brighton, Lewes and Hastings to the sea. The company were empowered to make and maintain such railway.

That by virtue of the powers of the above-mentioned act, the Brighton, Lewes and Hastings Railway Company, with the aid of the London and Brighton Railway Company, transferred to the South Coast Railway Company all the powers authorized by the last mentioned act with reference to the purchase of lands and the execution and maintenance of so much of the said last mentioned railway as lies between a specified point in the parish of St. Leonard's and Ashford.

That by virtue of the powers contained in the act for making a railway from the London and Brighton Railway to Lewes and Hastings with a branch therefrom, all in the county of Sussex, the London and Brighton Railway Company afterwards purchased of the Brighton, Lewes and Hastings Railway Company the undertaking authorized by that act, which, with all the powers and privileges, was transferred to the London and Brighton Railway Company.

That an act, 7 & 8 Vict. c. lxxvii., was passed for making a railway from the other line branch of the London and Brighton Railway to Chichester, incorporating certain persons under the name of the

Brighton and Chichester Railway Company, and they were empowered to raise money and make and maintain the railway.

That an act, 9 & 10 Vict. c. cclxxxiii., was passed to consolidate and unite the London and Brighton and the London and Croydon Railway Companies, and the undertakings belonging to them. And after reciting the above stated acts, and reciting that the London and Brighton Railway Company had purchased the Brighton and Chichester Railway, and all the powers and privileges given to the company; and after reciting that it would be advantageous to the public and also to the proprietors and shareholders of the several railway companies above mentioned if the several undertakings authorized by the several above-mentioned acts were consolidated, and if the said several companies interested in the same were incorporated into one company; the bill stated the 1st, 2nd, 4th, 5th, 6th, 22nd, 23rd, 24th, 26th, 31st, 36th, 37th, and 38th sections of the act which incorporated the several companies, by the name of the London, Brighton and South Coast Railway. It also stated that the plaintiff was the holder of divers shares in the several undertakings, which he had exchanged for forty-eight shares in the consolidated lines, and that he had purchased 100 other shares in the company.

The bill then stated the act, 9 & 10 Vict. c. lxxxiii., for making a railway from the Croydon and Epsom Railway at Epsom to the town of Portsmouth, to be called "The Direct London and Portsmouth Railway;" and after reciting that public benefits would arise from making the railway, the bill stated the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 9th, 15th, 16th, 20th, 21st, 23rd, 26th, 27th, 52nd, and 53rd sections of the act.

The bill also contained many other statements, allegations, and charges, which, with the arguments at the hearing, are sufficiently stated or referred to in the judgment.

Mr. Roundell Palmer and Mr. W. J. Borill, for S. Iaing and others, and for the London, Brighton and South Coast Railway Company, in support of the demurrer, cited—

Foss v. Harbottle, 2 Hare, 461, 497.

calls upon the 4,000 shares and 677 shares in the Direct London and Portsmouth Railway Company; and the bill prays for payment of the costs by the directors and the companies who are defendants, and for further relief.

To this bill two demurrers for multifariousness and for want of equity have been put in, one by the defendants, Samuel Laing, Leo Schuster, William Cash, Charles Sedgfield Crowley, Edward Crowley, George Frederick Hotham, John Lawrie, John Nix, and James Wishaw, and the London, Brighton and South Coast Railway Company; and the other demurrer, by William Arthur Wilkinson and the Direct London and Portsmouth Railway Company. The bill, though in a prolix and complicated form, states to the effect that, in the year 1846, there were five several railway companies known by the respective names of "The London and Croydon Railway Company," "The Croydon and Epsom Railway Company," "The London and Brighton Railway Company," "The Brighton, Lewes and Hastings Railway Company," and "The Brighton and Chichester Railway Company," and also another railway company, called "The Direct London and Portsmouth Railway Company." That 2,033 shares in the Direct London and Portsmouth Railway Company had become vested in William Arthur Wilkinson, Benjamin Baines, and John Lawrie in trust for the London and Croydon Railway Company; and by the 9 & 10 Vict. c. cclxxxiii. intitled "An Act to consolidate and unite the London and Brighton and the London and Croydon Railway Companies, and the undertakings belonging to them," it was enacted, that the several companies therein mentioned should be dissolved, and that the several powers vested in them should be given to the company thereby incorporated, and that the several persons and corporations who, before the passing of the act, were proprietors of shares in the capital or joint stock of the dissolved companies should be united into a company for the purpose of making, completing, and maintaining the railway, roads and works authorized to be made by and for the dissolved companies under the authorities vested in them, and for

those purposes should be incorporated by the name of "The London, Brighton and South Coast Railway," and the railway and appurtenances belonging to the dissolved companies, and also all monies, stocks, shares, securities, and books to which the dissolved companies were entitled were to become vested in the company thereby incorporated; and the act contained various enactments respecting the capital and stock of the company thereby incorporated, and the shares therein.

The plaintiff in this cause was, under the provisions of the act, entitled to forty-eight shares in the new company called the London, Brighton and South Coast Railway Company, and he afterwards purchased 100 other shares therein. It is not disputed by this bill, but that under the provisions of the act the 2,033 shares in the Direct London and Portsmouth Railway Company, which were vested in Messrs. Wilkinson, Baines and Lawrie, in trust for the London and Croydon Railway Company, became the property of the London, Brighton and South Coast Railway Company; but it is alleged that the bill for incorporating the London, Brighton and South Coast Railway Company contained no power authorizing the company directly or indirectly to subscribe for, or purchase any shares in the Direct London and Portsmouth Railway Company, or to apply their funds or capital for any such purpose, and none of the dissolved companies had any such power. The bill alleges that Samuel Laing, the chairman, Leo Schuster, the deputy chairman, William Cash, Charles Sedgfield Crowley, Edward Crowley, George Frederick Hotham, John Lawrie, John Nix and James Wishaw were directors of the London, Brighton and South Coast Railway Company; and that the same Samuel Laing, Charles Sedgfield Crowley, Edward Crowley, George Frederick Hotham, John Lawrie, John Nix and Leo Schuster were also directors of the Direct London and Portsmouth Railway Company.

The bill then states that before the Direct London and Portsmouth Railway Company could put in force the compulsory powers for taking land for the purpose of their railway, it was necessary that a sum of 1,450,000*l.*, the estimated expense,

Brighton and South Coast Railway Company, and that accordingly 677 additional shares in the Direct London and Portsmouth Railway Company, were, in pursuance of such agreement of the London, Brighton and South Coast Railway Company, purchased by Messrs. Schuster, Crowley and Hotham, or some other of the defendants, and the sum of 2,538*l.* 15*s.* was paid as purchase-money or deposit-money out of the funds of the London, Brighton and South Coast Railway Company.

The bill alleges that these transactions were, and were known to be illegal, and that an attempt was made to procure parliamentary sanction for the same, but that the bill brought in for that purpose was thrown out. The bill then proceeds to state that the Direct London and Portsmouth Railway Company being unable to complete their whole line had resolved to abandon the greatest portion of it, and to complete only about four miles of it, namely, that part from Epsom to Leatherhead, and that for the purpose of enabling them to complete even that part of it further assistance was required, and that it was agreed between the two companies, or their directors, that the London, Brighton and South Coast Railway Company should, out of their funds, supply the Direct London and Portsmouth Railway Company with pecuniary assistance for the purpose, and should accordingly pay them 20,000*l.* by way of what is called compensation for preliminary and parliamentary expenses, and that an application to the Direct London and Portsmouth Railway Company should be made to authorize the London, Brighton and South Coast Railway Company to purchase the four miles of railway from Epsom to Leatherhead for 50,000*l.*, including the 20,000*l.* which was to be paid in any event, and that in the mean time, and until parliamentary authority could be obtained, the London, Brighton and South Coast Railway Company should work the line intended to be purchased as if it were their own.

The bill then states at great, and as it appears to me at very unnecessary, length the proceedings in this court in the cause of *Cohen v. Wilkinson*, a report made to the meeting of the Direct London and

Portsmouth Railway Company, together with an address or speech of Mr. Wilkinson at a meeting of the London, Brighton and South Coast Railway Company, and an explanation or speech of Mr. Laing, all I presume inserted in the bill for the purpose of shewing negotiations between the companies for the purpose of completing, or obtaining authority for completing, the purchase by the London, Brighton and South Coast Railway Company of the portion of the line not abandoned by the Direct London and Portsmouth Railway Company for 50,000*l.*, including the 20,000*l.*, which in one place is called the premium.

It then states that the defendants, the present directors of the London, Brighton and South Coast Railway Company have already paid out of the funds of the London, Brighton and South Coast Railway Company some portion of the 20,000*l.*, and intend to pay a further sum to the Direct London and Portsmouth Railway Company on account thereof.

It was argued, for the demurrer, that the relief prayed for by the bill is to be divided into two parts, which are quite distinct, one in respect of the shares in the Direct London and Portsmouth Railway Company, purchased out of the funds of the London, Brighton and South Coast Railway Company, and the other in respect of the agreement alleged to have been made by the South Coast Railway Company with the Direct London and Portsmouth Railway Company, for the purchase of their line from Epsom to Leatherhead.

It was argued that, in respect of the 2,033 shares in the Direct London and Portsmouth Railway Company, which became vested in the London, Brighton and South Coast Railway Company by the act of parliament which incorporated them, and which has been called the Amalgamation Act, the London, Brighton and South Coast Railway Company became entitled to an interest in the affairs and concerns of the Direct London and Portsmouth Railway Company, and for the purpose of protecting that interest they were entitled to enlarge it if they thought fit, and thereby or otherwise to apply their own funds in promoting the interests of the Direct London and Portsmouth Railway Company, and

Brighton and South Coast Railway Company, and that accordingly 677 additional shares in the Direct London and Brighton Railway Company, were in pursuance of such agreement of the Brighton and South Coast Railway Company, purchased by Messrs. Crowley and Hotham, or some of the defendants, and the sum of money was paid as purchase-money out of the funds of the Brighton and South Coast Railway Company.

The bill alleges that the defendants were, and were known to be, that an attempt was made to effect a parliamentary sanction of the bill brought forward, and that the bill was thrown out. The bill states that the Brighton and South Coast Railway Company, complete, to abandon, to complete, namely, head, them, their, agree, dis, S., and it is not

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During of the cause before the Master of England, a decree was made referring it to the Master to take the accounts in an administration suit.

The estate proving insufficient to pay all legacies in full, by the order on further accounts it was ordered that the legacies be abated proportionally if necessary.

One of the legatees, not a party to the cause, on the 2nd of July 1849, obtained a petition an order as of course that the cause should be reheard upon further directions. The petition alleged merely as the ground for rehearing certain errors in the accounts which had been allowed by the Master. A motion was now made on the part of the plaintiff, that the order of the 2nd of July 1849 might be discharged, and that the petition of rehearing might be taken off the file.

Mr. James Parker and Mr. Torriano, in support of the motion.—An order for a rehearing, as of course, obtained upon the petition of a person who is not a party to the cause, is irregular; in such a case special leave of the Court is necessary—*Gwynne v. Edwards* (1). Errors in the accounts allowed by the Master are not grounds for a rehearing of the cause, but matters of exception to the report.

Mr. Malins and Mr. Roxburgh, contra.—The Attorney General had no interest in checking the accounts before the Master, as the assets were not sufficient to pay the legacies in full. The course adopted by the petitioner is pointed out in *Daniell's Chanc. Prac.* vol. 2. p. 1332, and is supported by the cases of *Giffard v. Hort* (2) and *Brookfield v. Bradley* (3). In *Gwynne v. Edwards* the petitioners had attended the Master on the taking of the accounts.

THE LORD CHANCELLOR.—If it has been decided that any person who is affected by a decree may have the cause reheard, as of course, I should feel myself bound by the practice. But as no such authority

(1) 9 Beav. 28, 34; s. c. 15 Law J. Rep. (N.S.) Chanc. 84.

(2) 1 Sch. & Lef. 398.

(3) 2 Sim. & S. 64.

M'Grath (by the supposition) acquired an absolute title to the *Miracle* by the registry of it in their names. The plaintiffs' equity, if any, attached on the purchase-money only, and not on the ship. Pollok became the owner of the ship, but did not touch the purchase-money in the hands of Crane & M'Grath. The argument therefore for the plaintiffs must be, that their equity would extend to Pollok's purchase-money as well as to that of Crane & M'Grath, for they can have no better ground for attaching the ship in his hands than in the hands of Crane & M'Grath. Now, it is impossible to contend that the plaintiffs not having any equity as against the ship in the hands of Crane & M'Grath or of Pollok, can have any equity as against Pollok's purchase-money. In fact, Pollok in taking the ship has taken that in which the plaintiffs have no interest. The difficulty in the plaintiffs' way to obtain relief against Pollok in either of the above hypotheses was, I suspect felt, by the counsel who drew the bill, for it contains charges framed with great care and accuracy, for the purpose of shewing that the purchase of Crane & M'Grath, and that by Pollok from them, were the result of a single scheme of fraud concocted by the Mackays, Crane, M'Grath and Pollok, for the purpose of defrauding the plaintiffs. The effect of these charges, if established, would or might be to place Pollok in the situation in which, by the above hypothesis, Crane & M'Grath stand with respect to the purchase-money; and as the *Miracle* has since been sold by Pollok, and the purchase-money is in the hands of the Rankins, who are parties to the cause, the plaintiffs have claimed a right to attach it in their hands.

The first question to be considered is, whether the imputed scheme of fraud is made out. To this I think the answer must be in the negative. Crane and M'Grath and John Pollok are not parties to the suit. The Rankins, against whom the relief is sought, deny the imputation. According to the evidence, the proposal to sell the *Miracle* to Crane & M'Grath originated with the Mackays. The *Miracle* was registered in the names of Crane & M'Grath, and they endeavoured to raise money upon it from one Wiggins,

and it was not until Wiggins had refused to advance money that the application was made to Pollok. At all events, the onus of proving the imputed fraud lies upon the plaintiffs, and they have not proved it. Notice to Pollok of the plaintiffs' claim, if such notice were proved, would not, as I have already said, affect this question. The bill, I think, must fail so far as it respects the ship and the proceeds of the sale of it.

Next, as to the cargo. At the time when the cargo arrived in this country the plaintiffs were creditors of the Mackays to an amount exceeding 14,000*l.*, and under the agreement of the preceding month of February it is impossible to deny that the plaintiffs were entitled to have the cargo consigned to them. This is independent of the question, whether advances to some amount were not made by the plaintiffs upon the security of the specific cargo, which, according to the evidence before me, must I think be taken to have been the case. But the question at law will, I think, be the same whether the balance due to the plaintiffs was in fact made up in part of the advances on this cargo or was advanced generally under the agreement of the 16th of February 1841. The question is, whether the property in the cargo did not vest in the plaintiffs under the bill of lading of the 31st of July 1841 and the documents which accompanied it, so as to deprive the Mackays of the power to alter the destination of the cargo. This is purely a question of law, but it arises in a suit in which this Court has undoubted jurisdiction to decide. I am prepared to give my opinion upon this point; but if either party desires the case to be decided at law rather than that I should decide it adversely against such party, I will put the case in a train for legal adjudication.

If the second question goes to law, the question of the freight, as to which I am not free from doubt, may be tried in the same proceeding (18).

(18) Feb. 7. The bill, so far as it related to the ship, was ordered to be dismissed, with costs, but not to be taxed until further order, and the defendant Rankin elected to try the questions of the plaintiffs' claim on the cargo and freight by an action at law on certain admissions.

M.R. 1849. Nov. 23; Dec. 4, 5, 6, 7, 8. 1850. Jan. 12.	}	SALOMONS v. LAING.
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*Railway Company—Capital—Dividends,
Application of—Demurrer.*

Five railway companies were amalgamated by act of parliament, under which the amalgamated company became entitled to 2,033 shares in the Direct L. and P. Railway Company. The amalgamated company subsequently subscribed for and obtained other shares in the Direct L. and P. Railway Company, which were taken in the names of three of the directors of the amalgamated company. The directors of this company, in concert with the directors of the Direct L. and P. Railway Company, afterwards formed a plan for the purchase of a portion of the line of the Direct L. and P. Railway Company, the remainder of which had, as alleged, been abandoned. Upon demurrer for want of equity and for multifariousness,—Held, that railway companies are bound to apply the monies authorized to be raised by act of parliament for the purposes directed by the act, and that after setting apart sufficient to meet contingencies, the surplus may be divided among the shareholders; that dividends belonging to shareholders may be applied by them severally, but that neither the company nor any assemblage of shareholders have any right to dispose of the portion of any shareholder in general dividends without his consent; that any dealing with the capital of the company not authorized by the act of parliament is illegal, and relief may be given in this court; that a company having lawfully obtained shares in another company forms no reason why such company should purchase other shares in the same company, and divert the funds of the company from the purposes for which they were raised, for the support of another company, and the demurrer for want of equity was overruled.

Held, also, that the allegations in the bill relating to the purchase of that part of the Direct L. & P. Railway which passed from E. to L. and the purchase of the shares in the Direct L. and P. Railway Company were distinct, and that no relief could be

given upon the two transactions in one bill, and the demurrer for multifariousness was allowed, and leave given to amend the bill.

This bill was filed by David Salomons, on behalf of himself and all other proprietors of shares in the London, Brighton and South Coast Railway Company, against Samuel Laing, Leo Schuster, William Cash, since deceased, Charles Sedgfield Crowley, Edward Crowley, George Frederick Hotham, John Lawrie, since deceased, John Nix, James Wishaw, the London, Brighton and South Coast Railway Company, William Arthur Wilkinson and the Direct London and Portsmouth Railway Company. The bill stated that an act, 5 & 6 Will. 4. c. x., was passed for making a railway from Croydon to join the London and Greenwich Railway, to be called the London and Croydon Railway Company, under which they were authorized to raise money to carry out the powers given to them by that and also by other acts of parliament relating to the company.

That an act was passed 7 & 8 Vict. c. xcii. for making a railway from the London and Croydon Railway at Croydon to Epsom, to be called the Croydon and Epsom Railway Company, under which they were authorized to raise money for the purposes of the undertaking.

By another act, 7 & 8 Vict. c. xcvi., the London and Croydon Railway Company purchased the Croydon and Epsom Railway, which, with all the rights, powers and privileges of the company, was transferred to the London and Croydon Railway Company.

That an act, 7 Will. 4. & 1 Vict. c. cxix., was passed for making a railway from the London and Croydon Railway to Brighton, with branches to Shoreham, Newhaven and Lewes, to be called the London and Brighton Railway Company, and they were authorized to raise money for the purpose of the undertaking.

That an act, 8 & 9 Vict. c. cxiii., was passed for making a branch railway from the London and Brighton Railway to or near to the town of Horsham in the county of Sussex, which the London and Brighton Railway Company were empowered to make and maintain.

That an act, 7 & 8 Vict. c. xci., was passed for making a railway from the London and Brighton Railway to Lewes and Hastings, with a branch therefrom, all in the county of Sussex, and the parties were incorporated under the name of the Brighton, Lewes and Hastings Railway Company, and were empowered to raise money for the purposes of the undertaking.

That an act, 8 & 9 Vict. c. lii., was passed to enable the Brighton, Lewes and Hastings Railway Company to make a branch railway from Southover, Lewes, to join the London and Brighton Railway at Keymer, and the last-named company were empowered to raise money to make the branch railway.

That an act, 8 & 9 Vict. c. cc., was passed to enable the Brighton, Lewes and Hastings Railway Company to make a railway from Bulverhithe in the county of Sussex, to Ashford in the county of Kent, and the Brighton, Lewes and Hastings Railway Company were empowered to raise money to make and maintain such railway.

That by virtue of the powers of the last-mentioned act, the Brighton, Lewes and Hastings Railway Company, with the consent of the London and Brighton Railway Company, transferred to the South-Eastern Railway Company all the powers conferred by the last-mentioned act with reference to the purchase of lands and the execution and maintenance of so much of the said last-mentioned railway as lies between a specified point in the parish of St. Leonard's and Ashford.

That by virtue of the powers contained in the act for making a railway from the London and Brighton Railway to Lewes and Hastings with a branch therefrom, all in the county of Sussex, the London and Brighton Railway Company afterwards purchased of the Brighton, Lewes and Hastings Railway Company the undertaking authorized by that act, which, with all the powers and privileges, was transferred to the London and Brighton Railway Company.

That an act, 7 & 8 Vict. c. lxxvii., was passed for making a railway from the Shoreham branch of the London and Brighton Railway to Chichester, incorporating certain persons under the name of the

Brighton and Chichester Railway Company, and they were empowered to raise money and make and maintain the railway.

That an act, 9 & 10 Vict. c. cclxxxiii., was passed to consolidate and unite the London and Brighton and the London and Croydon Railway Companies, and the undertakings belonging to them. And after reciting the above stated acts, and reciting that the London and Brighton Railway Company had purchased the Brighton and Chichester Railway, and all the powers and privileges given to the company; and after reciting that it would be advantageous to the public and also to the proprietors and shareholders of the several railway companies above mentioned if the several undertakings authorized by the several above-mentioned acts were consolidated, and if the said several companies interested in the same were incorporated into one company; the bill stated the 1st, 2nd, 4th, 5th, 6th, 22nd, 23rd, 24th, 26th, 31st, 36th, 37th, and 38th sections of the act which incorporated the several companies, by the name of the London, Brighton and South Coast Railway. It also stated that the plaintiff was the holder of divers shares in the several undertakings, which he had exchanged for forty-eight shares in the consolidated lines, and that he had purchased 100 other shares in the company.

The bill then stated the act, 9 & 10 Vict. c. lxxxiii., for making a railway from the Croydon and Epsom Railway at Epsom to the town of Portsmouth, to be called "The Direct London and Portsmouth Railway;" and after reciting that public benefits would arise from making the railway, the bill stated the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 9th, 15th, 16th, 20th, 21st, 23rd, 26th, 27th, 52nd, and 53rd sections of the act.

The bill also contained many other statements, allegations, and charges, which, with the arguments at the hearing, are sufficiently stated or referred to in the judgment.

Mr. Roundell Palmer and Mr. W. J. Bovill, for S. Laing and others, and for the London, Brighton and South Coast Railway Company, in support of the demurrer, cited—

Foss v. Harbottle, 2 Hare, 461, 497.

Mosley v. Alston, 1 Ph. 790; s. c. 16 Law J. Rep. (n.s.) Chanc. 217.

Campbell v. Mackay, 1 Myl. & Cr. 603; s. c. 6 Law J. Rep. (n.s.) Chanc. 73.

The Attorney General v. the Merchant Tailors' Company, 1 Myl. & K. 189; s. c. 2 Law J. Rep. (n.s.) Chanc. 22.

The Attorney General v. the Goldsmiths' Company, 5 Sim. 670; s. c. 4 Law J. Rep. (n.s.) Chanc. 22.

Saltridge v. Hyde, 5 Madd. 138; s. c. Jacob, 151.

Benson v. Hadfield, 5 Beav. 546; s. c. 12 Law J. Rep. (n.s.) Chanc. 89.

Mr. Malins appeared for *Mr. Wilkinson* and the Direct London and Portsmouth Railway Company, in support of the demurrer.

Mr. Turner and *Mr. Cole*, for the plaintiff, in support of the bill, cited—

Colman v. the Eastern Counties Railway Company, 10 Beav. 1; s. c. 16 Law J. Rep. (n.s.) Chanc. 73.

Cohen v. Wilkinson, 1 Hall & Twells, 554, and 1 Mac. & Gor. 481; s. c. 18 Law J. Rep. (n.s.) Chanc. 378, 411.

Natusch v. Irving, Gow on Partnership, App. 404, 4th edit.

Const v. Harris, Turn. & R. 496.

The Attorney General v. Cradock, 3 Myl. & Cr. 85; s. c. 6 Law J. Rep. (n.s.) Chanc. 341.

Mr. Roundell Palmer, in reply.

Jan. 12.—THE MASTER OF THE ROLLS.
—This cause came on for hearing on a demurrer to the plaintiff's bill, which prays a declaration that it was not within the powers of the London, Brighton and South Coast Railway Company, or the directors thereof, to subscribe for or purchase on behalf and out of the funds of that company any shares in the Direct London and Portsmouth Railway Company, and that the defendants, Leo Schuster, Edward Crowley and George Frederick Hotham, ought to be taken and considered as having subscribed for and purchased the 4,000 shares and 677 shares, which are in the bill mentioned, in the Direct London and

Portsmouth Railway Company, on their own account, and not as trustees for the London, Brighton and South Coast Railway Company, and that it may also be declared that an agreement or arrangement in the bill mentioned between the directors of the London, Brighton and South Coast Railway Company and the directors of the Direct London and Portsmouth Railway Company, with respect to the proposed railway from Epsom to Leatherhead, is not within the powers given to the London, Brighton and South Coast Railway Company, or to the directors thereof, but that the same is illegal and void, and, if necessary, that it may be delivered up to be cancelled; and that the defendants, Leo Schuster, Edward Crowley and George Frederick Hotham, the defendant, William Arthur Wilkinson, and also such of the defendants Samuel Laing, William Cash, Charles Sedgfield Crowley, John Lawrie, John Nix, and James Wishaw, as joined or concurred in any of the alleged payments in the bill mentioned out of the funds of the London, Brighton and South Coast Railway Company, may be decreed to replace the same, with interest thereon at 5l. per cent.; and that the defendants Samuel Laing, Leo Schuster, William Cash, Charles Sedgfield Crowley, Edward Crowley, George Frederick Hotham, John Lawrie, John Nix, and James Wishaw, may be decreed to replace and repay all the sums which have been or may be paid out of the funds of the London, Brighton and South Coast Railway Company, in pursuance of the said alleged agreement or arrangement respecting the proposed railway from Epsom to Leatherhead, and that proper directions may be given for a sale of the 2,033 shares in the Direct London and Portsmouth Railway Company, which formerly belonged to the London and Croydon Railway Company, and for bringing the proceeds of such sale to the funds of the London, Brighton and South Coast Railway Company, and that an injunction may be granted to restrain the parties from carrying out the agreement as to the proposed railway from Epsom to Leatherhead, and also from applying any of the monies or funds of the London, Brighton and South Coast Railway Company in payment of the 20,000l. or in payment of further

calls upon the 4,000 shares and 677 shares in the Direct London and Portsmouth Railway Company; and the bill prays for payment of the costs by the directors and the companies who are defendants, and for further relief.

To this bill two demurrers for multifariousness and for want of equity have been put in, one by the defendants, Samuel Laing, Leo Schuster, William Cash, Charles Sedgfield Crowley, Edward Crowley, George Frederick Hotham, John Lawrie, John Nix, and James Wishaw, and the London, Brighton and South Coast Railway Company; and the other demurrer, by William Arthur Wilkinson and the Direct London and Portsmouth Railway Company. The bill, though in a prolix and complicated form, states to the effect that, in the year 1846, there were five several railway companies known by the respective names of "The London and Croydon Railway Company," "The Croydon and Epsom Railway Company," "The London and Brighton Railway Company," "The Brighton, Lewes and Hastings Railway Company," and "The Brighton and Chichester Railway Company," and also another railway company, called "The Direct London and Portsmouth Railway Company." That 2,033 shares in the Direct London and Portsmouth Railway Company had become vested in William Arthur Wilkinson, Benjamin Baines, and John Lawrie in trust for the London and Croydon Railway Company; and by the 9 & 10 Vict. c. cclxxxiii. intitled "An Act to consolidate and unite the London and Brighton and the London and Croydon Railway Companies, and the undertakings belonging to them," it was enacted, that the several companies therein mentioned should be dissolved, and that the several powers vested in them should be given to the company thereby incorporated, and that the several persons and corporations who, before the passing of the act, were proprietors of shares in the capital or joint stock of the dissolved companies should be united into a company for the purpose of making, completing, and maintaining the railway, roads and works authorized to be made by and for the dissolved companies under the authorities vested in them, and for

those purposes should be incorporated by the name of "The London, Brighton and South Coast Railway," and the railway and appurtenances belonging to the dissolved companies, and also all monies, stocks, shares, securities, and books to which the dissolved companies were entitled were to become vested in the company thereby incorporated; and the act contained various enactments respecting the capital and stock of the company thereby incorporated, and the shares therein.

The plaintiff in this cause was, under the provisions of the act, entitled to forty-eight shares in the new company called the London, Brighton and South Coast Railway Company, and he afterwards purchased 100 other shares therein. It is not disputed by this bill, but that under the provisions of the act the 2,033 shares in the Direct London and Portsmouth Railway Company, which were vested in Messrs. Wilkinson, Baines and Lawrie, in trust for the London and Croydon Railway Company, became the property of the London, Brighton and South Coast Railway Company; but it is alleged that the bill for incorporating the London, Brighton and South Coast Railway Company contained no power authorizing the company directly or indirectly to subscribe for, or purchase any shares in the Direct London and Portsmouth Railway Company, or to apply their funds or capital for any such purpose, and none of the dissolved companies had any such power. The bill alleges that Samuel Laing, the chairman, Leo Schuster, the deputy chairman, William Cash, Charles Sedgfield Crowley, Edward Crowley, George Frederick Hotham, John Lawrie, John Nix and James Wishaw were directors of the London, Brighton and South Coast Railway Company; and that the same Samuel Laing, Charles Sedgfield Crowley, Edward Crowley, George Frederick Hotham, John Lawrie, John Nix and Leo Schuster were also directors of the Direct London and Portsmouth Railway Company.

The bill then states that before the Direct London and Portsmouth Railway Company could put in force the compulsory powers for taking land for the purpose of their railway, it was necessary that a sum of 1,450,000*l.*, the estimated expense,

should be subscribed for, but that no more than 1,250,000*l.*, including the 2,033 shares, or the value of such shares, which had belonged to the London and Croydon Company, had been subscribed for, and consequently that further subscriptions to the amount of 200,000*l.* at least were requisite to be obtained, but it was found impracticable to obtain them in the ordinary way, and that, under such circumstances, the directors of the two companies concurred in a scheme for supplying the deficient subscriptions, which were wanting by the Direct London and Portsmouth Railway Company, out of the funds of the London, Brighton and South Coast Railway Company, by means of some of the directors subscribing for shares in the Direct London and Portsmouth Railway Company in their own names, but, as alleged, as trustees for the London, Brighton and South Coast Railway Company; and on the 16th of October 1846 the directors of the Direct London and Portsmouth Railway Company passed a resolution as follows:—"Whereas previously to notice being given for the purpose of taking land, it is necessary that the signatures to the parliamentary contract should be completed to the extent of the estimated expenses for making the railway, namely, 1,450,000*l.*, it is resolved, that with a view to complete the subscriptions to the whole amount mentioned in the act as the estimated sum for defraying the expenses of the undertaking, and which is requisite before any of the powers for the compulsory purchase of land can be enforced, the London, Brighton and South Coast Railway Company be requested to claim subscriptions to the contract to the extent of 200,000*l.*, as the agreement between the two parties contemplates that any capital required beyond the sum of 1,250,000*l.* should be provided by the London, Brighton and South Coast Railway Company." And on the 4th of November 1846 the directors of the London, Brighton and South Coast Railway Company resolve, that the shares necessary to complete the capital of the Direct London and Portsmouth Railway Company be issued to Mr. Schuster, Capt. Hotham and Mr. Crowley, that the deposit be paid on them, and the members of the board be requested to sign the Direct London and Portsmouth

Railway Company's deed for the needful amount, and that 2,033 shares standing in the names of Messrs. Wilkinson, Baines and Lawrie be transferred to the said trustees after the deed shall be fully signed in respect of such shares; and that on the 10th of November 1846 it was resolved by the directors of the Direct London and Portsmouth Railway Company, that 4,000 shares to represent the capital, referred to in the resolution of the 16th of October, should be issued to Leo Schuster, Edward Crowley and George Frederick Hotham, as trustees for the London, Brighton and South Coast Railway Company, agreeably to the resolution of the board of directors of the 4th of November. In pursuance of the agreement made and of these resolutions, the defendants Leo Schuster, Edward Crowley, and George Frederick Hotham subscribed their names for, and procured to be allotted to them 4,000 shares in the Direct London and Portsmouth Railway Company. They executed the deeds relating to the shares, and they and the other directors of the London, Brighton, and South Coast Railway Company paid out of the monies and funds of that company the sum of 15,000*l.* for such 4,000 shares in the Direct London and Portsmouth Railway Company, being after the rate of 3*l.* 15*s.* for each share; and, further, the 2,033 shares, formerly standing in the names of Messrs. Wilkinson, Baines and Lawrie, were transferred into the names of Messrs. Schuster, Crowley and Hotham, in addition to the 4,000 shares; and afterwards with a view to give further assistance to the Direct London and Portsmouth Railway Company out of the funds of the London, Brighton and South Coast Railway Company, the defendants, the directors of the London, Brighton and South Coast Railway Company, agreed that such further assistance should be advanced out of the funds of the London, Brighton and South Coast Railway Company, and that the defendants Leo Schuster, Edward Crowley, and George Frederick Hotham, or some other of the directors should subscribe for, or purchase certain additional shares in the Direct London and Portsmouth Railway Company, and that the deposit or purchase-money for such shares should be paid out of the funds of the London,

Brighton and South Coast Railway Company, and that accordingly 677 additional shares in the Direct London and Portsmouth Railway Company, were, in pursuance of such agreement of the London, Brighton and South Coast Railway Company, purchased by Messrs. Schuster, Crowley and Hotham, or some other of the defendants, and the sum of 2,538*l.* 15*s.* was paid as purchase-money or deposit-money out of the funds of the London, Brighton and South Coast Railway Company.

The bill alleges that these transactions were, and were known to be illegal, and that an attempt was made to procure parliamentary sanction for the same, but that the bill brought in for that purpose was thrown out. The bill then proceeds to state that the Direct London and Portsmouth Railway Company being unable to complete their whole line had resolved to abandon the greatest portion of it, and to complete only about four miles of it, namely, that part from Epsom to Leatherhead, and that for the purpose of enabling them to complete even that part of it further assistance was required, and that it was agreed between the two companies, or their directors, that the London, Brighton and South Coast Railway Company should, out of their funds, supply the Direct London and Portsmouth Railway Company with pecuniary assistance for the purpose, and should accordingly pay them 20,000*l.* by way of what is called compensation for preliminary and parliamentary expenses, and that an application to the Direct London and Portsmouth Railway Company should be made to authorize the London, Brighton and South Coast Railway Company to purchase the four miles of railway from Epsom to Leatherhead for 50,000*l.*, including the 20,000*l.* which was to be paid in any event, and that in the mean time, and until parliamentary authority could be obtained, the London, Brighton and South Coast Railway Company should work the line intended to be purchased as if it were their own.

The bill then states at great, and as it appears to me at very unnecessary, length the proceedings in this court in the cause of *Cohen v. Wilkinson*, a report made to the meeting of the Direct London and

Portsmouth Railway Company, together with an address or speech of Mr. Wilkinson at a meeting of the London, Brighton and South Coast Railway Company, and an explanation or speech of Mr. Laing, all I presume inserted in the bill for the purpose of shewing negotiations between the companies for the purpose of completing, or obtaining authority for completing, the purchase by the London, Brighton and South Coast Railway Company of the portion of the line not abandoned by the Direct London and Portsmouth Railway Company for 50,000*l.*, including the 20,000*l.*, which in one place is called the premium.

It then states that the defendants, the present directors of the London, Brighton and South Coast Railway Company have already paid out of the funds of the London, Brighton and South Coast Railway Company some portion of the 20,000*l.*, and intend to pay a further sum to the Direct London and Portsmouth Railway Company on account thereof.

It was argued, for the demurrer, that the relief prayed for by the bill is to be divided into two parts, which are quite distinct, one in respect of the shares in the Direct London and Portsmouth Railway Company, purchased out of the funds of the London, Brighton and South Coast Railway Company, and the other in respect of the agreement alleged to have been made by the South Coast Railway Company with the Direct London and Portsmouth Railway Company, for the purchase of their line from Epsom to Leatherhead.

It was argued that, in respect of the 2,033 shares in the Direct London and Portsmouth Railway Company, which became vested in the London, Brighton and South Coast Railway Company by the act of parliament which incorporated them, and which has been called the Amalgamation Act, the London, Brighton and South Coast Railway Company became entitled to an interest in the affairs and concerns of the Direct London and Portsmouth Railway Company, and for the purpose of protecting that interest they were entitled to enlarge it if they thought fit, and thereby or otherwise to apply their own funds in promoting the interests of the Direct London and Portsmouth Railway Company, and

it was further suggested that the bill not alleging that the purchased shares were paid for out of capital, but only out of the funds of the London, Brighton and South Coast Railway Company, those funds may have been such as the directors had authority to apply in the manner they did; and it was alleged that there are in fact various modes in which it might have been done, and in which, on the argument of the demurrer, it ought to be presumed to have been done without going beyond the powers of the act of parliament.

These arguments were urged with great zeal and ability, but I am of opinion that they cannot be maintained. A railway company incorporated by act of parliament is bound to apply all the monies and property of the company for the purposes directed and provided for by the act of parliament, and not for any other purpose whatever. When the expenses are paid and the public purposes directed and provided for by the act of parliament, which, in truth, was the motive and inducement for granting the extraordinary powers given by all these acts of parliament, when those purposes are fully performed, any surplus which may remain, after setting apart the sum to answer contingencies, may, if not applied in enlarging, improving or repairing the works, be divided among the shareholders. The dividends which belong to the shareholders, and are divisible among them, may be applied by them severally as their own property, but the company itself, or the directors, or any number of shareholders assembled at a meeting or otherwise, have no right to dispose of the shares of the general dividend which belong to the particular shareholder, in any manner contrary to the will or without the consent or authority of that particular shareholder. Any application of, or dealing with the capital, or any part of the capital, or any funds or money of the company which may come under the controul or management of the directors or governing body of the company, in any manner not distinctly authorized by the act of parliament, is, in my opinion, an illegal application or dealing; and, without meaning to say that it is or could be practicable for individual shareholders to interfere on every occasion, however small, of alleged

misapplication of particular sums, I am of opinion, that if, as in this case, the directors are proceeding upon an illegal principle, and for purposes not authorized by the act of parliament, to involve the company, or the shareholders of the company, or any of them, in liabilities to which the shareholders, or any of the shareholders, never consented, relief may and ought to be given in this court; and that the mere circumstance of the London, Brighton and South Coast Railway Company having obtained, as it is not now disputed they did lawfully obtain, a certain number of shares in the Direct London and Portsmouth Railway Company, is not a reason why the company should be enabled or permitted to purchase more shares, and thereby increase the risks to which parliament permitted the shareholders to be exposed by the shares, which may have become vested in them by the Amalgamation Act, or any reason why the directors should be permitted to divert so much of the funds of the company as they think proper, or indeed any portion of those funds, for the support of another company having distinct objects and meant to be applied to purposes different from those in consideration of which alone those powers were granted to them; I am, therefore, of opinion that the demurrers for want of equity must be overruled.

The demurrers for multifariousness remain to be considered, and having regard to the mode in which the allegations are stated in the bill, I think that the grounds of complaint are stated as distinct matters. It was argued, for the plaintiff, that the agreement for the purchase of the line from Epsom to Leatherhead was but a sequence of the former transaction as to the purchase of shares; but I have sought in vain for any allegation in the bill which in the least degree connects the transactions. I may conjecture (and I think it is rather difficult not to conjecture) that all the transactions are connected, and form parts of one design or scheme, but as such scheme is not distinctly stated, and I can only proceed upon that which is distinctly stated, which in the great prolixity of the bill, I collect to be that there was an illegal transaction for the purchase of shares in the Direct London

and Portsmouth Railway Company, and another illegal transaction for the purchase of the railway and other property of the same company: the two transactions are, as I think, both of them illegal, and that for the same reason, that they alike involve illegal applications of the funds of the London, Brighton and South Coast Railway Company: but they are not alike, either as to the persons affected by them, or as to the relief which may be given in respect of them, and unless they are alike in a way which does not appear by the bill, I think relief cannot be given upon the two transactions in one bill. I must, therefore, allow the demurrers for multifariousness, and give leave to the plaintiff to amend his bill.

Mr. Turner.—Then there will be no costs?

THE MASTER OF THE ROLLS.—I cannot help hoping that if you do amend this bill according to the leave, some pains will be taken to abbreviate it. I really am quite concerned to find that bills of this description, necessarily and unavoidably long, should be made unnecessarily long by stating proceedings in this court, proceedings in parliament, and speeches of directors made at public meetings: that is not proper.

L.C. }
1849. } BERRY v. THE ATTORNEY
Nov. 26. } GENERAL.

Practice—Petition for rehearing by a Person not a Party to the Cause.

A person affected by a decree, but not a party to the cause, obtained upon petition as of course an order to rehear the cause:—Held, that the petition was irregular, and it was ordered to be taken off the file with costs.

A person not a party to the cause cannot petition for a rehearing without the special leave of the Court first obtained.

This was a suit instituted by a legatee, administratrix with the will annexed, to administer the estate of the testator in the cause. The only defendant was the

Attorney General as entitled to the residue, if any, of the estate, the testator having died without any next-of-kin.

On the hearing of the cause before Vice Chancellor of England, a decree was made, referring it to the Master to take usual accounts in an administration. The estate proving insufficient to pay the legacies in full, by the order on that direction it was ordered that the legacies should abate proportionally if necessary.

One of the legatees, not a party to the cause, on the 2nd of July 1849, obtained upon petition an order as of course that the cause should be reheard upon fresh directions. The petition alleged that as the ground for rehearing certain errors in the accounts which had been allowed the Master. A motion was now made on the part of the plaintiff, that the order of the 2nd of July 1849 might be discharged and that the petition of rehearing might be taken off the file.

Mr. James Parker and *Mr. Torriani* in support of the motion.—An order for rehearing, as of course, obtained upon petition of a person who is not a party to the cause, is irregular; in such a case a special leave of the Court is necessary. *Gwynne v. Edwards* (1). Errors in the accounts allowed by the Master are not grounds for a rehearing of the cause, but matters of exception to the report.

Mr. Malins and *Mr. Roxburgh*, contra.—The Attorney General had no objection in checking the accounts before the Master, as the assets were not sufficient to pay the legacies in full. The course adopted by the petitioner is pointed out in *Deane v. Chanc. Prac.* vol. 2. p. 1332, and is supported by the cases of *Giffard v. Heald* and *Brookfield v. Bradley* (3). In *Gwynne v. Edwards* the petitioners had attended the Master on the taking of the accounts.

THE LORD CHANCELLOR.—If it had been decided that any person who is affected by a decree may have the cause reheard as of course, I should feel myself bound to follow the practice. But as no such authority

(1) 9 Beav. 28, 34; s. c. 15 Law J. Rep. Chanc. 84.

(2) 1 Sch. & Lef. 398.

(3) 2 Sim. & S. 64.

has been produced I think the course that has been adopted is clearly irregular; and the consequence of my affirming this order would be, that any person not a party to the cause who was affected by the decree might have a rehearing, and take the conduct of the cause. But where a decree has been obtained, a person who is not a party cannot so intervene merely at his own pleasure. The Court will not in this summary way take the conduct of the cause from the plaintiff; and therefore the party who wishes to interfere must first come to the Court and shew a ground for taking away the conduct of the cause from the plaintiff, and must obtain the special leave of the Court to do that which he wishes to do. The case of *Gwynne v. Edwards* has a close analogy to this case; and conceiving that case to be in strict accordance with the ordinary practice of the Court, and finding no authority to the contrary, I must order this petition to be taken off the file with costs.

L.C. { *In re* THE ST. GEORGE'S STEAM
Nov. 6. { PACKET COMPANY *ex parte*
PIMM.

Company—Joint-Stock Companies' Winding-up Act, 1848—Appeal Motion.

The Master charged with the winding up of a company declined on two several occasions to insert the name of J. P. as a contributory either on his own account or in his representative character; and the Vice Chancellor, on two distinct appeals, confirmed these decisions of the Master. A motion was then made before the Lord Chancellor to discharge or vary the two orders of the Vice Chancellor, and that J. P. might be included in the list of contributories, as a contributory, either in his own right or as personal representative, in respect of a certain number of shares, and either for the whole in one character, or for part in one character and part in another:—Held, upon a preliminary objection, that this was not an appeal motion within the provisions of the Joint-Stock Companies' Winding-up Act, 1848.

NEW SERIES, XIX.—CHANC.

In this case the Master, charged with the winding up of this company under the Joint-Stock Companies' Winding-up Act, 1848, had declined to put the name of Joshua Pimm on the list of contributories on his own account; and on a motion, by way of appeal, before Knight Bruce, V.C. this decision of the Master was confirmed. A second application was then made to the Master, that the name of Joshua Pimm might be put on the list of contributories in respect of the same shares, as executor of his late father. The Master having declined to insert his name upon the list as such executor, this decision was also affirmed, on appeal, by Knight Bruce, V.C.

The official manager now moved, by way of appeal, before the Lord Chancellor, that the two orders of Knight Bruce, V.C. might be discharged or varied, and that Joshua Pimm might be ordered to be included in the list of contributories to the company, as a contributory either in his own right, or as personal representative of his late father for the number of forty shares, or any less number of shares, and either for the whole in one character, or for part in one character and part in another character, as the Court should think fit.

Mr. Roundell Palmer and Mr. Pearson, for the respondent, took a preliminary objection to the form of the notice of motion as irregular, inasmuch as it asked the decision of the Court upon a question which never was before the Master, and never could have been decided by the Master. That no such case as that raised by the present motion had been decided by the Vice Chancellor Knight Bruce. The motion was therefore an entire evasion of the Winding-up Act; and they cited, in support of the objection, the cases of—

In re The North of England Joint-Stock Banking Company ex parte Glaholm,
1 Hall & Twells, 121; s. c. 18 Law
J. Rep. (N.S.) Chanc. 147, and
Ex parte Hutchinson, 1 De Gex & S.
563.

Mr. Bacon and Mr. Prior, in support of the motion, urged that by the form of the notice of motion, the respondent had

full notice of the case he would have to meet, in accordance with the spirit of the provisions of the Winding-up Act, and the object of the motion was to avoid circuitry of proceedings and expense.

The LORD CHANCELLOR, observing that the notice of motion in its present form was contrary to the spirit of the Winding-up Act, and clearly involved matter that was not before Knight Bruce, V.C., refused the motion, with costs.

WIGRAM, V.C. { *In re* THE YORK AND
1849. LONDON ASSURANCE
Jury 14, 17. COMPANY, *ex parte*
HODSELL.

Company—Joint-Stock Companies Winding-up Act—Petition by Shareholder pending Action against him.

The usual order for dissolving and winding up a company was made upon the petition of a shareholder, notwithstanding an action was then pending against him for payment of calls.

This was a petition under the Joint-Stock Companies Winding-up Act, 1848 (1), to dissolve and wind up the York and London (late the York and North of England) Assurance Company.

Mr. Wood and Mr. Hetherington, for the petitioner, a shareholder and contributory.

The Solicitor General and Mr. Freeling opposed the petition, upon the grounds that an action was pending against the petitioner for the amount of calls of 5*l.* upon each of the shares held by the petitioner, and that the object of the petition was to stay proceedings in the action.

Mr. Wood replied.

WIGRAM, V.C. made the usual order for dissolving and winding up the company.

WIGRAM, V.C. { *In re* THE PORT OF LO
Jan. 26. SHIPOWNERS' LOAN
ASSURANCE COM
ex parte COLLINGE

Company—Joint-Stock Companies Winding-up Acts, Order under, pending proceedings under Lord Dalhousie's Act—contributory, Right of, to oppose Petition

The commencement by a creditor of proceedings, under Lord Dalhousie's Act, for purpose of making a joint-stock company bankrupt, will not preclude a contributory from subsequently obtaining the usual order for dissolution and winding up under the Stock Companies Winding-up Acts, 1849.

Whether a creditor not being a contributory is entitled to oppose the petition latter—quære.

This was a petition under the Joint-Stock Companies Winding-up Acts, 1849 (1) for the dissolution and winding up of the Port of London Shipowners' and Assurance Company. It was presented by a shareholder and contributory stated that the company was provisionally registered and a deed of settlement executed in 1847, and that its object was mutual assurance of vessels belonging to shareholders and their cargoes against loss from sea, fire, men of war, rovers, rebels, and other risks. Proceedings under Dalhousie's Act (2) for the purpose of making the company bankrupt had recently been commenced by the holder of a debenture granted by it. The company had continued to carry on business, and had transferred its business to the Sea, Fire, and Life Assurance Company.

Mr. Roxburgh appeared for the petitioner.

Mr. W. T. S. Daniel appeared to oppose the petition, on behalf of the contributory who had proceeded against the company.

Mr. Roxburgh objected that a creditor or other person not being a contributory

(1) 11 & 12 Vict. c. 45, and 12 & 13 Vict.

(2) 7 & 8 Vict. c. 111. An act for facilitating the winding up the affairs of Joint-Stock Companies unable to meet their pecuniary engagements.

could not be heard in opposition to the petition. Contributories were the only persons entitled to present a petition (3). It was clear that opposition by contributories only was contemplated by the legislature, because the amended act of 1849 (4) provided, that every contributory should be furnished on request with a copy of the petition, but did not give the same right to any other person. There could not be any reason for extending to a creditor not being a contributory the right to oppose the petition.

[WIGRAM, V.C. said, that before deciding upon the objection, he should like to know the ground upon which the creditor rested his right to oppose the petition.]

Mr. W. T. S. Daniel.—The creditors who have commenced the proceedings under Lord Dalhousie's Act are the proper parties to have the management of the affairs of the company. The order sought by the petition would, if granted, deprive them of such management, and render their previous proceedings useless.

Mr. Roxburgh replied.—The order to wind up the company would not prejudice the proceedings of the creditor at law or otherwise, but merely stay them until his debt had been proved before the Master. Even this stay of proceedings could not be obtained until the appointment of an official manager—*In re The India and Australia Mail Steam Packet Company* (5). If the creditor should fail to prove his debt before the Master, he might notwithstanding obtain an order from the Court for liberty to continue his proceedings at law—*In re The Patent Elastic Pavement and Kamptulicon Company* (6).

WIGRAM, V.C. made the usual order for the dissolution and winding up of the company.

WIGRAM, V.C.
Jan. 21, 22.

{ *In re* THE DIRECT LONDON,
PORTSMOUTH AND CHICHESTER AND DIRECT
PORTSMOUTH AND CHATHAM RAILWAY COMPANY, *ex parte* GOLD-SMITH.

Company—Joint-Stock Companies Winding-up Acts—Allottees—All Debts and Claims alleged to have been satisfied—Costs.

A petition for the dissolution and winding up of a company by an allottee, who had paid the required portions of the deposit on his shares, was opposed on the ground that all debts and claims had been settled by the company. The Court, not being satisfied that a certain claim against the company had been decided at law upon merits, and it being sworn that other debts were still due from it, and that several allottees of shares had not paid any portion of the share deposits, made the usual order.

This was a petition under the Joint-Stock Companies Winding-up Acts, 1848, 1849, (1), praying for the dissolution and winding up of the Direct London, Portsmouth and Chichester, and Direct Portsmouth and Chatham Railway Company. It stated that the company was projected and provisionally registered in 1845, with a proposed capital of 1,900,000*l.*, in 95,000 shares of 20*l.* each, and upon each of which a deposit of 2*l.* 2*s.* was to be paid. The managers of the company subsequently determined that the sum of 10*s.*, a part of the deposit of 2*l.* 2*s.* per share, should be paid in November 1845, and the remainder in January 1846. The petitioner was the allottee of 150 shares, and had duly paid the deposit of 10*s.* on each share. The proposed line of railway was surveyed, and other proceedings were taken; but the residue of the deposits was never paid, nor any part of the sum deposited returned, and ultimately the project was entirely abandoned without any application being made to parliament in respect of it. The petition stated that the company had incurred debts to a large amount, and that some still remained unsatisfied, the whole or a pro-

(3) 11 & 12 Vict. c. 45. s. 5.

(4) 12 & 13 Vict. c. 108. s. 2.—As to the right of any person other than a contributory to appear and oppose the petition, see *In re the Eastern Counties Junction and Southend Railway Company*, 14 Law Times, 369.

(5) 18 Law J. Rep. (N.S.) Chanc. 390.

(6) *Ante*, 123.

(1) 11 & 12 Vict. c. 45. and 12 & 13 Vict. c. 108.

portionate part of which the provisional committee and allottees were liable to pay; some of whom had made contributions, but many others had not made any payment in respect of such debts. It was then alleged, that if all the members of the provisional committee and the allottees were to contribute what they ought, the debts of the company would be provided for, and a considerable surplus would remain, from which the petitioner would be entitled to repayment of part of the sum paid by him.

Affidavits in support of the petition stated, *inter alia*, that in addition to two debts of 100*l.* and 50*l.* due from the company to Mr. Oliver and Mr. Crook, respectively, the company was indebted to Messrs. Drayson, the engineers of the company, for surveying, in a sum exceeding 8,000*l.*, and that one of the Messrs. Drayson having been a registered promoter of the company, it had been made an objection to their remedy at law that he was thereby a partner in the company and could not sue at law.

Two of the managing committee of the company filed affidavits in opposition to the petition. They stated that all the outstanding demands of the creditors in respect of the project had been paid and satisfied; that it had been virtually decided in the case of *Willey v. Parratt* (2), that the allottees who had paid down part of the deposits on their shares in the company could not recover them, because they were applicable and had been applied to payment of the expenses; and that the company was in fact already wound up and its business and affairs settled and adjusted.

Another affidavit of one of the managing committee stated, that in the action brought by Messrs. Drayson against the chairman, to recover the amount alleged to be due to them, the verdict was given against them mainly on the ground that they had depended for compensation on the ultimate success of the project, and on the evidence of letters shewing that they were precluded from recovering their demand either from the managing or provisional committees.

(2) 3 Exch. Rep. 211; a. c. 18 Law J. Rep. (N.S.) Exch. 82.

This statement in the last affidavit contradicted by one of the Messrs. Drayson and the effect of the letters mentioned, explained.

Mr. Wood, for the petition.

Mr. Bacon, contra, urged that the present case was not within the Winding-up Acts, as all the debts of the company had been satisfied or determined, and the sole object of the petition was to afford Messrs. Drayson an opportunity of testing in the Master's office their claim against the company.

Jan. 22. — WIGRAM, V.C. — I consider this case to be within the acts of 1862 and 1877. It clearly is so, *prima facie*. The case of the petitioner is that of a person who was the allottee of shares upon which he might have been called on to deposit of 2*l.* 2*s.* per share, and on a certain day and the remainder in the month of January then next following. In the allotment of the shares, the petitioner and others did pay down 10*s.* per share. It appears that a great number of persons who applied for shares, and to whom shares were in fact allotted, have not paid the sum in respect of such shares, whilst others, it is alleged, have paid more than they were bound to do. There is no question as to the allotment of shares, and I do not say that the allottees who have paid for their shares are not entitled to a dividend upon their claims. It appears also that there are debts due from the company, one of which amounts to 100*l.* and another to 50*l.*, and it is stated that there is an unsatisfied debt due to the surveyor-engineer. There is nothing on the face of the petition to withdraw this case from the provisions of the Winding-up Act, and there is clear proof that the whole of the company have already been wound up, and that nothing more remains to be done. I have not sufficient evidence before me to satisfy my mind that this is the case. A statement was made in opposition to the petition, which, at the time it was made, made an impression upon me, and to this effect, that as to one of the debts which had been mentioned by the

tioner, the case had been tried at law upon the merits, and decided against the plaintiffs; but if the affidavits in support of the petition are to be believed, that case was not tried upon the merits, but was decided upon the technical objection that the claimant, being a promoter of the scheme, could not bring an action against the other promoters. The statement in the counter affidavit to this is not satisfactory. But what I proceed upon is, that it is sworn that there are debts unpaid, and that other persons besides the petitioner applied for shares, and to whom allotments were made. There is, therefore, sufficient for a reference. If it should turn out that the reference has been improperly made, it can be set right upon the question of costs. I have nothing to do with the suggestion that the object of the petition is to favour a particular individual, by enabling him to bring forward his claim a second time. If the petitioner has sufficiently established his case, I am not at liberty to reject the petition merely because some collateral purpose may be served by it in favour of another person. I must, therefore, make the usual order for the dissolution and winding-up of this company.

L.C. }
1849. } *In re* BARTHOLOMEW'S
Nov. 13, 16. } TRUST.

Will—Vested Legacy.

*The testator gave to trustees the sum of 2,000*l.* in trust to invest and pay the income to his daughter for her life, and after her death to pay and assign the trust fund to his daughter's children as and when they should severally attain the age of twenty-one years, in equal shares; to whom he gave and bequeathed the same accordingly, with benefit of survivorship in case any child died before his share became payable, and with a direction to apply the income of their shares for maintenance during minority:—Held, that the only child of the daughter (who died under twenty-one) took a vested interest.*

Thomas Bartholomew by his will, dated the 8th of March 1820, gave a sum of 2,000*l.*

to trustees, in trust, to invest the same upon government securities, and to pay the interest thereof into the proper hands of his daughter, Mary Ann Buller, for her separate use for life, and after her decease upon trust that the trustees should stand possessed of the said sum of 2,000*l.* upon trust to pay the same or assign the security or securities whereon the same might be then placed or invested unto, between or amongst all and every the child and children of his said daughter, Mary Ann, as and when they should severally attain the respective ages of twenty-one years, in equal shares and proportions, share and share alike; to whom he gave and bequeathed the same accordingly, with benefit of survivorship to or amongst such child or children, in case of the death of any one or more of them before such share or shares of and in the said sum of 2,000*l.* should become payable; and upon further trust that the trustees should, after the death of his daughter, pay and apply the interest and dividends of the said 2,000*l.* for or towards the maintenance, clothing and education of such child or children of his said daughter, until their respective shares thereof should become payable, in proportion to their respective shares therein, as the trustees should in their discretion think fit.

The testator died in 1826. Mary Ann Buller married the petitioner, and there was issue of that marriage, one child, who died an infant and unmarried. Mary Ann died in 1847. The money was paid into court under the 10 & 11 Vict. c. 96, and the father of the infant then presented a petition for the payment out of the fund to him, as administrator of his child. The petition came on to be heard before the Vice Chancellor of England on the 21st of March 1849, when His Honour held that the legacy was vested in the child, and made an order for the payment out of the fund to the petitioner.

The executor of the residuary legatee of Thomas Bartholomew, the testator, now presented a petition, praying that the order of the Vice Chancellor might be discharged, and the petition dismissed.

Mr. Malins and Mr. Hobhouse, for the petitioner.—Here there is no gift except

in the direction to pay and transfer in a given event; if that event never happens, no payment is to be made—*Leake v. Robinson* (1). The subsequent words—"to whom I give and bequeath the same accordingly" must be interpreted in connexion with the previous direction to pay; namely, to such children as shall attain twenty-one. The clause of survivorship will not alter the construction—*Leake v. Robinson*. The gift of maintenance will not make the legacy vested, as that is left to the discretion of the trustees—*Vawdry v. Geddes* (2), *Watson v. Hayes* (3), *Leeming v. Sherratt* (4).

Mr. Rolt, Mr. Lloyd, and Mr. Nalder, contrà.—If the gift and the direction to pay are so connected together that they cannot be separated, then the gift is contingent; but here there is an independent gift, and the word "accordingly" merely refers to the equal shares and proportions. The whole income is also given for maintenance, and the discretion given to the trustees is merely as to the mode of applying it. It is a circumstance to shew the intention of vesting—*Hammond v. Maule* (5).

Mr. Hetherington, for the trustees.

Mr. Malins replied.

Nov. 16.—The LORD CHANCELLOR.—The language of the will brings this case within the rule of *Leake v. Robinson*. That rule is, that, where there is an antecedent gift, a direction to pay upon the attainment of a certain age will not postpone the vesting of the legacy; but if there is no gift previous to the direction to pay, then the attainment of the prescribed age is necessary to enable the legatee to acquire a vested interest. The question in the present case is, whether this will contains an independent gift of the legacy; and I am of opinion that it does. After the

direction to pay, follow the words, "to whom I give and bequeath the same accordingly." Those words are words of direct gift to whatever parties "to whom" are to be referred. Those words, in my opinion, refer as plainly "to all and every the children and child of the testator's daughter," as if these words had been repeated. If those words had come before the direction to the trustees to pay, no doubt could have been raised. The question then turns upon the word "accordingly;" but any other construction than that which referred it to all the children of the daughter would, as I think, be contrary to the intention of the testator, and founded upon a pure technicality. I think that the gift was immediate to the daughter's children, and the payment only was postponed. If the gift was to such of the children only as attained twenty-one, then the clause of survivorship was useless; and it is to be observed, also, that, by the maintenance clause, each child was to enjoy the whole interest of its share; and the discretion of the trustees was only to be exercised as to the mode of applying that interest. I am therefore clearly of opinion that the Vice Chancellor was right in his construction of the bequest; and the appeal must be dismissed, with costs.

M.R. }
March 16. } HITCHCOCK v. CLENDINEN.

Baron and Feme—Scotch Domicile—Husband's Right to Wife's Personal Estate—His Right to elect to take Freeholds in England when vested in Trustees for Sale.

By a decree made in this cause, Isobel the wife of James M'Hardy, and Henry Buckle, as the administrator of C. C, were declared to be entitled in equal moieties to the money to arise from a freehold messuage and premises in England, which had been conveyed to trustees for sale. Before the decree was drawn up James M'Hardy presented a petition to this Court stating that he and his wife were born in Scotland, and were domiciled there; that by the law of Scotland marriage operated as an assignment of the wife's personal estate to the husband; that he was entitled to

(1) 2 Mer. 387.

(2) 1 R. & M. 203; s. c. 8 Law J. Rep. Chanc. 63.

(3) 5 Myl. & Cr. 125; s. c. 9 Law J. Rep. (N.S.) Chanc. 49.

(4) 2 Hare, 17; s. c. 11 Law J. Rep. (N.S.) Chanc. 423.

(5) 1 Coll. 281; s. c. 13 Law J. Rep. (N.S.) Chanc. 386.

recover the whole without her concurrence, and without her being entitled to any settlement; and it prayed that the freehold house might be conveyed to him and Henry Buckle, and their heirs:—Held, that the petitioner being entitled to the produce of the real estate might elect and take the estate itself, but the fact of the parties electing must be recited in the decree.

Elizabeth Anne Stewart, by an indenture, dated the 2nd of October 1830, conveyed a freehold messuage and hereditaments in Albemarle Street, in the county of Middlesex, to Richard Hitchcock and James Maxwell Thompson, upon trust, for Elizabeth Anne Stewart for life, and after her decease, upon trust, to sell the same and stand possessed of the produce for her children; but if there should be no child who should attain a vested interest, and Jane M'Eiver, the aunt of the said Elizabeth Anne Stewart, should die in her lifetime, then, upon trust, after the decease of the said E. A. Stewart, to hold the produce of the said estate upon such trusts as the said E. A. Stewart should appoint, and in default of appointment, in trust for the person or persons who at the time of the decease of the said E. A. Stewart, having survived the said Jane M'Eiver, should be next-of-kin of the said Jane M'Eiver, to be divided between and among such persons, if more than one, according to the Statute of Distributions of the estates of intestates.

On the 18th of December 1830 Jane M'Eiver died, and in 1831 Elizabeth Anne Stewart intermarried with Alexander Clendinen, and died in May 1835, without having had any child who attained a vested interest in the said estate, or in the money to arise by the sale thereof, and without having made any appointment. Upon a reference to the Master he found that Catherine Colville and the defendant Isobel M'Hardy were the only next-of-kin of Jane M'Eiver living at the death of Elizabeth Anne Clendinen; that Catherine Colville died on the 1st of June 1841, when Henry Buckle procured letters of administration to her estate and effects to be granted to him.

At the hearing of the causes, a decree

was made declaring that Isobel M'Hardy, and Henry Buckle, as the administrators of Catherine Colville, were entitled in equal moieties to the produce to arise from the sale of the freehold estate.

Before the decree was drawn up, James M'Hardy presented this petition stating that he and his wife, Isobel M'Hardy, were born in Scotland, and had always been and were then domiciled there; that marriage, by the law of Scotland, operated as an absolute assignment of the wife's personal property to the husband, and that the wife had no equity to a settlement out of it: and praying that R. Hitchcock and J. M. Thompson might be directed absolutely to convey the freehold messuage and hereditaments which had been conveyed to them by the indenture of the 2nd of October 1830, unto and to the use of the petitioner, James M'Hardy, and the defendant, Henry Buckle, and their heirs, as tenants in common, as they elected and desired to take the estate itself, instead of having it converted into money by a sale thereof. It was also stated that the rents of the estate had been paid into court since May 1835, and that there was a sum of 1,500*l.* 13*s.* 1*d.* 3 per cent. Bank annuities in court, standing to the credit of these causes, with a sum of 71*l.* 18*s.* 10*d.* cash, which had accrued due for a dividend thereon; and that these sums, together with the residue of the rents and profits in the hands of the receiver, were more than sufficient to pay all costs, charges, and expenses of the suits, &c., and that there was no necessity to sell the messuage and hereditaments to provide for such payments, as a surplus of the funds in court would probably remain, to which the petitioner, and Henry Buckle were entitled in moieties. The petition was supported by the affidavit of a Scotch advocate, which stated, "that by the law of Scotland the whole personal estate of a married woman vested absolutely in her husband; that by such law a married woman is not entitled in equity or otherwise to any settlement of her personal estate or any part thereof; but that a husband is entitled to receive the whole of the personal estate of his wife without any consent or concurrence of his wife, and without making any settlement thereof, or

of any part thereof for her benefit." There were also other affidavits proving the domicile, and that no settlement or agreement for a settlement affecting the property had been made upon the marriage.

Mr. Turner and Mr. W. R. Ellis, on behalf of the petitioner.—By the trusts of the deed the freehold house was converted into personal estate which the husband, by the law of his domicile, was absolutely entitled to. He has a right to elect to take the realty, and to take the estate itself without going through the process of selling it.

Mr. Roupell and Mr. Beavas, for the plaintiff.

Mr. Cairns and Mr. Twells, for other parties.

THE MASTER OF THE ROLLS.—The petitioner being entitled to the produce of the real estate may exercise his option of taking the estate as it stands without a sale. The decree must recite that the parties have made the election.

L.C. 1848. Nov. 15, 16. 1849. Nov. 20.	}	MANGLES v. DIXON.
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Incumbrance—Prior Equity postponed—Conduct.

By a charter-party, dated in April 1845, made between *B. & Co.*, the owners, and *M. & Co.*, it was agreed that *M. & Co.* should charter the ship *F.* at a certain rate, the freight to be payable by certain instalments at fixed periods, and the remainder at the termination of the voyage. By a separate, but contemporaneous, instrument, it was agreed between the same parties that the speculation should be at their joint risk. The charter-party remained in the hands of *B. & Co.*, who, in December following, deposited it with their bankers, as a security for money advanced. The bankers in March 1846 gave notice to *M. & Co.* of the deposit, and claimed the freight due and to become due thereunder. Several payments were then so made by *M. & Co.* to the bankers

in accordance with the charter-party. *Co.* afterwards became bankrupt. In 1846 the ship returned, and the advertisement proving a losing one, *M. & Co.* then informed the bankers that it was at the risk of themselves and *B. & Co.* :—upon appeal, that *M. & Co.* by their act had precluded themselves from insisting against the bankers upon their prior equity, and the order for an injunction to restrain the bankers from proceeding upon an action at law, commenced by them to recover the whole of the unpaid freight, was dissolved.

This was an appeal from a decision of the Vice Chancellor Knight Bruce.

The question raised upon the appeal was whether the conduct of the plaintiffs in disclosing their prior equity, and in acts which apparently negatived the existence of such equity, after full notice of subsequent equitable incumbrance or had precluded them from asserting prior equity as against the subsequent incumbrancers.

Mr. Cooper and Mr. Lovat appeared for the appellants, Messrs. Dixon & Co. for the respondents, subsequent incumbrancers, and

Mr. Humphry and Mr. J. Smith, in support of the decree.

The facts of the case are fully set out in his Lordship's judgment.

Nov. 20, 1849.—**THE LORD CHANCELLOR.**—By a charter-party of affreightment dated the 23rd of April 1845, in which Messrs. Boyd & Co. were described as the owners of the ship *Fifeshire*, Messrs. Mangles & Co., in consideration of the hire of the ship for eighteen months, agreed to pay certain freight to Messrs. Boyd & Co. at different periods, the ultimate payment to be upon delivery of the cargo. Upon the face of this document Messrs. Boyd & Co. were represented as owners, and Messrs. Mangles & Co. as charterers, and the whole of the freight was made payable by Messrs. Mangles & Co. to Messrs. Boyd & Co. This charter-party was deposited with Messrs. Dixon & Co. by Messrs. Boyd & Co., and the following memorandum written upon it:—"Messrs. Mangles, Price & Co.—I hereby pay the amount of what is due from

date to Messrs. Dixon & Co. or their order. John Boyd & Co., 1st of December 1845." This was a security to Messrs. Dixon & Co. for an advance of 12,000*l.* in the preceding month of May. Notice of this deposit and assignment was given to Messrs. Mangles & Co. on the 14th of March 1846, and 150*l.* of the freight having become due on the 1st of May 1846, Messrs. Dixon & Co. on the 16th of that month claimed payment of that sum from Messrs. Mangles & Co., and in the letter making that claim mentioned the insolvency of Messrs. Boyd & Co., although no fiat had at that time issued against them. On the 20th Messrs. Mangles & Co. paid the 150*l.* to Messrs. Dixon & Co. and wrote to them the following note:—"We have now the pleasure to inclose you bank notes for 150*l.*, being the amount due on account of charter-party by the ship *Fifeshire*, made over to you by Messrs. John Boyd & Co. for which be good enough to send us a stamped receipt. Mangles & Co., 20th of May 1846." On the 1st of June and the 1st of July 1846, two other sums of 150*l.* each having become due for freight, Messrs. Mangles & Co. on the 9th of July 1846 paid the amount to Messrs. Dixon & Co. In August 1846 the ship returned, and the adventure being completed it appeared that a loss would be the result, and upon application by Messrs. Dixon & Co. for the balance due for freight by Messrs. Mangles & Co. payment was refused, which led to an action as to which there could be no defence at law, and the present bill was filed for an injunction, which was ordered by the decree on a certain sum being paid by Messrs. Mangles & Co. to Messrs. Dixon & Co. without prejudice.

Upon this state of facts there could be no doubt of the title in Messrs. Dixon & Co. to receive the whole freight, after the notice of the 14th of March 1846. By the deposit and indorsement there was an equitable assignment of the debt, with notice to the debtors. But the case is met and has been decided against Messrs. Dixon & Co., upon a transaction between Messrs. Boyd & Co. and Messrs. Mangles & Co., of which Messrs. Dixon & Co. had no notice. It appears that it was agreed between Messrs. Boyd & Co. and Messrs. Mangles & Co., that the adventure should be a joint adven-

ture as between those two houses; and it was contended that Messrs. Mangles & Co. are therefore liable only for one-half of the freight made payable by the charter-party. This arrangement was intended to be secret: it was for that purpose made in the first instance between Messrs. Mangles & Co. and Mr. Ashton, the clerk of Messrs. Boyd & Co., who by a separate instrument made themselves responsible for the acts of Ashton. And it is to be observed, that although the adventure was clearly to be conducted by Messrs. Mangles & Co., yet there was no proof made and no inquiry directed as to whether the deposit of the charter-party to secure the 12,000*l.* and the borrowing of that sum was not for the purpose of the joint adventure, which, if such was the fact, particularly after the knowledge and acquiescence of Messrs. Mangles & Co., would form a very important consideration in deciding upon the right of Messrs. Mangles & Co. to dispute the title of Messrs. Dixon & Co. But there is, I think, sufficient to come to a very safe conclusion upon the equities of the case without taking that point into consideration. Assuming, therefore, for the present view of the case, that Messrs. Boyd & Co. did not borrow or apply the 12,000*l.* for the purpose of the joint adventure, and that they had no right to pledge the freight for securing the repayment of that sum, we have the fact that Messrs. Mangles & Co. having the secret right to receive one-half of the freight, represented by that charter-party that they were liable to pay the whole, and that Messrs. Boyd & Co. were entitled to receive the whole of it. They therefore put into the hands of Messrs. Boyd & Co. the means of imposing upon others, not merely by concealing their own right, but by declaring that they had no such right, but that the whole belonged to Messrs. Boyd & Co.

It is a well known rule, that the party having a secret equity who stands by and permits the apparent owner to deal with others as if he was the absolute owner, as if there was no such equity, should not be permitted to assert such secret equity against a title founded upon such apparent ownership. Many decisions have been founded on this principle. But the case does not rest upon it: for not only was the secret equity suppressed, but the party

claiming it has armed the apparent owner with proof, resting upon his own declaration, that none such existed: and therefore cannot afterwards dispute an act founded upon such apparent ownership as against the party claiming under it.

The last case in the House of Lords of *The Duke of Beaufort v. Neeld* (1) makes it unnecessary to refer to other authorities. The Duke signed and put into the hands of his agent an authority to consent to any exchange under an inclosure act, but directed his agent privately not to act upon such authority unless under certain circumstances. The agent produced the authority and agreed to an exchange not under the stipulated circumstances; upon which ground the Duke disputed the agreement so entered into, but the House of Lords held the Duke bound. This case, however, does not rest here: for whatever knowledge Messrs. Mangles & Co. may have had of the transaction before the 14th of March 1846, they had on that day regular notice of the deposit and assignment, by which they were informed formally, and probably not for the first time, that Messrs. Boyd & Co. had assigned the whole of the future freight to Messrs. Dixon & Co., but they made no assertion of their supposed equity, or raised any question as to the right of Messrs. Boyd & Co. so to dispose of the freight. But, on the contrary, they paid the amount due, and in their letter recognized the fact that the charter-party had been made over to Messrs. Dixon & Co. by Messrs. Boyd & Co., and so late as July 1846 paid to them the two instalments which had become due on the 1st of June and the 1st of July. These payments were also made after the insolvency of Boyd & Co., and the last two after a fiat had been issued against them, which was on the 25th of May. It was therefore at that time the interest of Mangles & Co., if they had any ground for disputing the title of Dixon & Co. under the deposit and assignment of Boyd & Co., to have resisted those demands. But it does not appear that they did so until the return of the ship in August 1846, when it was apparent that the adventure would be a losing one. This conduct of Mangles & Co. is, in my opinion, con-

clusive between them and Dixon & Co. If the act of Boyd & Co. required confirmation, it was sufficient to confirm it. But it is perhaps of more importance as proving they had no equity as against that act, and as of itself creating a bar to any such right which they might have had, by permitting Dixon & Co. to continue in the supposition that the security of Boyd & Co. was sufficient. It is impossible to know now how far they might have improved their position if the claim of Mangles & Co. had been asserted in March 1846, or the following month of May, when the 150*l.* was paid, although their attention was then called to the fact of the insolvency of Boyd & Co.

Upon all these grounds I am of opinion that Dixon & Co. are entitled to the full benefit of all the freight reserved by the charter-party which became due after the notice of March 1846, and as they were made parties to the suit solely upon the ground that they were not so entitled, the bill as against them ought to have been, and must now be dismissed with costs. It is however, I hope, probable that the action will not proceed, and that the amount of freight due will be settled between the parties.

L.C.	}	SAWYER v. MILLS.
1849.		
Nov. 22.		

Staying Suit—Offer to pay the Plaintiff's Demand.

A legatee, who was entitled to a share of the proceeds of an estate directed to be sold, provided the sum realized did not exceed a certain amount, mortgaged his share twice, and before the fund became divisible filed his bill against the trustees and other parties interested, and his mortgagees, for the performance of the trusts and for an account of what was due upon the mortgage, charging the trustees with breach of trust, and charging that nothing was due upon the mortgage; and asking that the trustees might pay the costs of suit. When the period of division arrived the trustees paid the other legatees their shares. On motion by all the defendants, except the mortgagees, the bill was dismissed against all the defendants except the mortgagees, upon the trustees paying the plaintiff's legacy into

(1) 12 Cl. & F. 249.

court, and paying to the plaintiff and the mortgagees their costs of suit up to and inclusive of the motion.

Thomas Mills, by his will, dated in 1830, devised to his three sons certain freehold premises at Egham, in Surrey, upon trust, as soon as conveniently might be after his decease, to sell the same and invest the proceeds upon government securities, for the benefit of the children of his deceased daughter Maria Sawyer, and to accumulate the interest and dividends thereof until the youngest child of Maria, who should be living at his decease, and who should live to attain the age of twenty-one years, should attain that age, and thereupon to divide the fund equally between and among the children of Maria who should be then living; but in case the said trust fund, with the accumulations thereof, should exceed the sum of 2,300*l.*, then the surplus thereof above the said sum was to be divided equally among such of the testator's sons as should be then living; and he appointed his three sons his executors.

There were four children of Maria Sawyer living at the testator's death, the youngest of whom attained twenty-one on the 25th of September 1849, whereupon the trustees paid to the three younger children of Maria Sawyer their respective one-fourth shares of the trust fund. In 1846, the plaintiff, Joseph Sawyer, the eldest child of Maria, agreed to mortgage his share of the fund to Mercy Sawyer, and in March 1849 he made a second mortgage thereon to E. Cutler. Mercy Sawyer died in 1848, and one of her executors was also one of the executors and trustees under the will of the testator. The freehold premises at Egham were not sold pursuant to the trusts of the will.

On the 22nd of March 1849, the plaintiff filed this bill against the trustees, the representatives of Mercy Sawyer, Edward Cutler, and his three brothers, charging the trustees with various breaches of trust, in not having sold the premises at Egham, and in not having accumulated the rents and profits; and also charging that, upon the balance of account, there was nothing now due to the representatives of Mercy Sawyer upon her equitable mortgage. The

bill then prayed that the trusts of the will might be carried into execution as far as regarded the Egham property, and for a declaration that the trustees had been guilty of a breach of trust, and for an account of the rents and profits, and also for an account of what was due on Mercy Sawyer's mortgage, and also on E. Cutler's mortgage, and for a receiver; and asking that the trustees might pay the costs of the suit. The trustees put in their answer, and having afterwards paid to the three other children of Maria their one-fourth shares of the trust fund, on the 25th of September gave notice to the plaintiff's solicitor that they were prepared to pay his share, but in consequence of its being incumbered they should pay it into court, unless he consented to its being paid to Mercy Sawyer's executors, which he declined to do. On the 23rd of October 1849, a motion was made on behalf of all the defendants, except Cutler, that the trustees might be ordered on or before the 15th of November 1849 to pay into the Bank, to the credit of the cause, the sum of 575*l.*, being one-fourth part of the sum of 2,300*l.*, together with the sum of 4*l.* 0*s.* 4*d.*, being interest thereon from the 25th of September 1849; and that it might be referred to the Taxing Master to tax the costs of the plaintiff and of the defendant E. Cutler up to the present time, and that the same when taxed might be ordered to be paid by the trustees, and that upon such payment into the Bank, and payment of such costs to the plaintiff and Cutler, the bill might be dismissed against all the defendants except Cutler and the representatives of Mercy Sawyer; and that in the mean time all proceedings might be stayed, save for the purpose of enforcing the order to be made on the motion.

This motion came on to be heard before the Vice Chancellor of England, who refused it, with costs. It was now renewed before the Lord Chancellor.

Mr. Roll and *Mr. Craig*, in support of the motion, contended that the trustees had offered the plaintiff all that he could by possibility claim from the testator's estate; that he was not injured by the estate at Egham not being sold, as it remained a security for his benefit; and

that the trustees ought not to be involved in a litigation upon a question between the plaintiff and the representatives of Mercy Sawyer, in which question they had no interest—

Sisell v. Abraham, 8 Beav. 598.

Pemberton v. Topham, 1 Ibid. 316.

Mr. Stuart and *Mr. Toulmin*, contra, insisted that, upon this motion the bill could not be dismissed, except upon the offer of the trustees to pay all the costs of the suit, all that the plaintiff asked—*Damer v. the Earl of Portarlington* (1).

The LORD CHANCELLOR.—This case falls strictly within the rule of the Court that upon the plaintiff's receiving all that on the face of the pleadings he can be entitled to, the bill will be dismissed. The plaintiff is entitled to one-fourth part of a sum of 2,300*l.* upon the youngest child of Maria Sawyer coming of age, which event did not take place until September last. Before the fund became divisible the plaintiff filed his bill to secure the property; but having previously incumbered his share, he brings those incumbrancers also before the Court. The necessity of making these persons parties to the suit arises from the act of the plaintiff. Why should the trustees pay all the costs of these parties? What is it that the plaintiff can obtain against the trustees in this suit? He says that the trust estate has sustained some damage by what is called a breach of trust; but his share of the money is forthcoming, and there is an offer to pay also the costs of the incumbrancers up to this time. But it is said the trustees ought also to pay the future costs of the suit; but these relate solely to the contest between the plaintiff and his incumbrancers. When a defendant offers to give to the plaintiff all that by possibility he could be entitled to upon the pleadings, the Court, to prevent litigation, will stay all further proceedings in the suit. Upon payment of the money into the Bank, and payment of the costs in the terms of the notice of motion, the motion must be granted.

(1) 2 Phil. 30.

M.R. }
Jan. 16. } *Ex parte COLLINS.*

Public Improvements — Promoters — Private Property, Costs of Taking—Payment—Apportionment.

R. C. obtained an agreement for a lease of some warehouses and premises, which was deposited with his solicitor, who subsequently agreed to advance 300*l.* to *R. C.* for the repairs of the premises, upon his signing a memorandum charging them with that amount, and with all further advances not exceeding 500*l.* The premises were afterwards taken by the corporation of London, by virtue of an act of parliament, for making public improvements, and in consequence of questions between *R. C.* and his solicitor respecting the amount due upon the security, and also in consequence of notice of a judgment debt due by *R. C.*, the purchase-money was paid into court, and upon a petition by *R. C.* asking for an account, and that 500*l.* might be set apart to answer what should be found due from him to his solicitor, and that the surplus, after payment of the judgment debt, might be paid to *R. C.*:—*Held*, that the amount of debt between *R. C.* and his solicitor must be ascertained by the Master, that the corporation need not attend, but that it must pay the costs of this petition, but not of the affidavits made relating to the claims of the parties.

An Act, 10 & 11 Vict. c. cclxxx. was passed for making a new street from the west end of Cannon Street to Queen Street, and for effecting other improvements in the city of London, by which the Corporation was empowered to take such lands, &c. as might be required for the purpose of the act and to enter into agreements for the purchase thereof. And it was enacted, that so much of the Lands Clauses Consolidation Act, 1845, as related to the purchase of land otherwise than by agreement should not be incorporated with that act. The act also contained the usual provisions for payment of the purchase-money into court, and for taking possession of the premises required in cases where a conveyance could not be obtained or a good title made; and in all such cases it was enacted, that it should be lawful for the Court of Chancery to order the Corporation of

London to pay the costs of the purchase, or taking of the lands, or which should have been incurred in consequence thereof, other than such costs as were then due or otherwise provided for, and the costs of the investments of the purchase-money in government or real securities, and of the reinvestments thereof in the purchase of other lands, and also the costs of obtaining the proper orders for any of the purposes aforesaid, and of the orders for the payment of the dividends and interest of the securities, upon which the money should be invested, and for payment out of court of the principal of such money, or of the securities whereon the same should be invested, and of all proceedings relating thereto, except such as were occasioned by litigation between adverse claims.

By an agreement dated the 6th of October 1840, William Soltau, in consideration of certain sums to be expended in repairs, agreed to grant a lease of divers warehouses and premises in the line of the intended improvements to Robert Collins, for a term of sixty-one years, at a rent of 42*l.*

In 1840 and 1841, John Hollis Anthony acted as the solicitor of Mr. Collins, and the agreement for the lease was delivered to him as the solicitor of R. Collins, who in May 1841 was indebted to Mr. Anthony for business done, but for which no bill of costs had ever been delivered.

R. Collins, being in want of money to repair the warehouses and premises comprised in the agreement, applied to Mr. Anthony, who agreed to advance him 300*l.* upon his having the repayment secured.

On the 15th of May 1841, accordingly, R. Collins wrote as follows to Mr. Anthony: "I have assigned to you all my estate and interest in the warehouses and premises and charged the same to secure 300*l.* advanced by you to me, and such further sum not exceeding 500*l.* as you may hereafter advance." At the same time Mr. Collins signed a letter to Mr. Soltau requesting him to grant the lease to Mr. Anthony. These documents were still in the hands of Mr. Anthony, but it was alleged that no sum was due upon them, and that such would appear if the accounts of all sums of money received by Mr. Anthony on behalf of Mr. Collins were produced. It

was also alleged that Mr. Collins was ignorant of what sums had been advanced towards the repair of the premises, and certainly that 500*l.* was not due, as Mr. Anthony had received the rents of Mr. Collins's estates, and more than sufficient to pay what was due upon the security.

The Corporation entered into an agreement with R. Collins for the purchase of the warehouses and premises comprised in the agreement of the 6th of October 1840, for 1,400*l.*, but no assignment was made because of the disputes between Mr. Collins and Mr. Anthony respecting the claims made by the latter.

The Corporation was also served with notice of a judgment obtained by Edward Scott and William Parsons, and which was lodged with the sheriff of London, for a debt due to them by R. Collins. Under these circumstances the Corporation of London paid 193*l.* 13*s.* 7*d.* to Mr. Soltau for an arrear of rent due to him, and 59*l.* 0*s.* 11*d.* for rates, &c. amounting in all to 252*l.* 14*s.* 6*d.* On the 21st of December 1849, the Corporation paid into court the balance of the 1,400*l.*, amounting to 1,147*l.* 5*s.* 6*d.*, which was placed to the credit of "*Ex parte* the Mayor and Corporation of the city of London, the account of Robert Collins, John Hollis Anthony, E. Scott, W. Parsons, and all other the parties interested in the leasehold warehouses and premises."

The petition prayed an account of what, if anything, was due to Mr. Anthony on the memorandum, and that 500*l.*, part of the sum so standing to the credit of "*Ex parte* the Mayor and Corporation of the city of London," should be laid out in stock, to the account of "*Ex parte* Robert Collins and J. H. Anthony, mortgage account," and that out of the residue Messrs. Scott & Parsons should be paid the sum due to them, and that the surplus should be paid to the petitioner, and that the Corporation should pay the costs.

Several affidavits were made by the parties in support of their claims upon the purchase-money.

Mr. Turner and Mr. Faber, in support of the petition.—Mr. Anthony claims a lien upon the purchase-money for his bill of costs, but he was the solicitor of Mr.

Collins, and has taken a security upon the property, and could not tack his bill of costs to that: all lien, therefore, was superseded, as an express contract always negatived an implied contract.

Cowell v. Simpson, 16 Ves. 275.

Balch v. Symes, Turn. & Russ. 87.

Mr. Elderton for *Mr. Anthony*.—In the cases cited, the security taken was for costs which of course ousted the lien, but in this case the memorandum related to the money advanced only, and the money in court represented the property.

Mr. Randell, for the Corporation of London. — This petition has become necessary from the adverse claims upon the purchase-money, and the length of the petition has been increased in consequence, and the costs doubled; there is therefore an objection to pay the costs both of the petitioner and *Mr. Anthony*. By the 8 Vict. c. 18. s. 34. costs only were to be paid by promoters of an undertaking where a less sum was awarded than was offered, in which case each party was to bear his own costs, and the costs of the arbitrators were to be borne in equal proportions. That clause applied to the 10 & 11 Vict. c. cclxxx, which was a local act. Upon the face of this petition, it appeared that there was litigation between the parties; it contained statements of facts relating to the parties, and of accounts between them; and affidavits had been made in respect of them. If, therefore, the Corporation was to be called upon to pay any costs, they ought to be confined only to so much of the petition as related to payment of the money, and they ought not to pay the costs of the affidavits.

Mr. Turner, in reply, said there was a difference about the division of the purchase-money, but no adverse litigation.

The MASTER OF THE ROLLS.—I must refer it to the Master to ascertain the circumstances under which the memorandum was given to *Mr. Anthony*, and also to ascertain the sum of money due to him. It was necessary to bring the Corporation of the city of London before the Court, but it will not be necessary for them to attend before the Master. These local improvements interfere with private pro-

perty, and make applications to this Court necessary. The Corporation must therefore pay the costs which have been incurred, except as to the affidavits which relate to the claims of the parties between themselves.

M.R. }
Jan. 18. } DOYLE v. DOYLE.

Copy Bill of Revivor—Service—23rd Order of August 1841—Trustees—Acquiescence—Proceedings—Delivery of Title Deeds.

The legal representatives of the survivor of two trustees, who had been appointed by the Court, and in whom the legal estate in real and personal estate was vested, were served with a copy of a bill of revivor, which prayed that they might be bound by the proceedings: they gave notice of their intention not to appear, as they considered the proceedings irregular, on the ground that they ought to have been served with a subpoena; but they allowed the proceedings in the causes to go on. Various orders were made, for the appointment of new trustees, maintenance, &c., and finally, for the division of the funds; and also for the delivery to the new trustees of the title deeds of the real estate, which had been brought into court by the original trustees:—Held, that the trustees, with notice, having permitted the parties to proceed, and obtain orders, without applying to the Court for leave to be heard, could not subsequently be heard to say that no valid order had been made against them.

Held also, that they could not be prejudiced by the order to deliver the deeds out of court, as they were never in their hands; and the petition was dismissed, with costs.

This petition was presented in four suits by *Henry John Turner* and *Edward Layton*, in whom the legal estate in real and personal property in question in this cause was found to be vested, asking that an order, dated the 10th of December 1849, might be discharged, with costs, and that directions might be given to re-transfer into the name of the Accountant General certain stock which had been transferred in pursuance thereof.

The petition, upon which the order of

the 10th of December 1849 now sought to be discharged was made, was presented by Watkin Doyle, Edward Doyle, Alfred Taylor Channer, John William Parker Field and James Nicholls. It stated that William Crowther by his will, dated the 16th of November 1813, demised a real estate at Sandhunt, in the county of Gloucester, to his son William Watkin Crowther for life, with remainder to Christopher Smith and his, the testator's, wife, Jemima Crowther, and their heirs, upon trust to sell, and stand possessed of the produce for the children of his son; and in case his son should have no child, or they should all die without issue, his said trustees were to stand possessed of the purchase-money for the children of his daughter Charlotte Doyle. The testator also gave the real and personal estate to C. Smith and John Shirley, after the death of his, the testator's, wife, upon similar trusts, and he directed them to stand possessed of his residuary personal estate, as to one moiety for his son W. W. Crowther for life, and as to the other moiety for his daughter Charlotte for life for her separate use, with remainder for their children *per capita* and not *per stirpes*, and the testator appointed C. Smith and his, the testator's, wife executors of his will.

The testator died on the 4th of July 1815, and his widow alone proved the will, and died on the 8th of October 1816, and upon her decease letters of administration, dated the 30th of October 1816, with the will of the testator annexed, were granted to W. W. Crowther and C. Doyle.

The original bill in the first suit was filed in 1817, and it prayed for the usual accounts and for the appointment of new trustees in the place of Messrs. Smith and Shirley, who had declined to act, and on the 14th of February 1818 a decree was made, declaring that the will ought to be published and the trusts performed, and directed various accounts to be taken.

In 1821, after the decease of the testator's wife, the Master found that the title of the estates, of which the testator seized, had been brought into court, in pursuance of an order, dated the 1st of July 1822, the several sums of £1,000, of which the testator was possessed, transferred into the name of the

Accountant General of the Court by J. Doyle and Charlotte his wife, and W. W. Crowther, the administrators *de bonis non* of the testator.

On the 14th of June 1826, in pursuance of two orders, Isaac King and Henry Holden Turner were appointed by the Master to be trustees in the place of Messrs. Smith and Shirley, against whom the suits were dismissed, and by deeds, dated the 30th and 31st of July 1826, the trust estates of the testator were conveyed and assigned to the new trustees.

On the 10th of April 1829 the Master found that W. W. Crowther died on the 31st of May 1827, without leaving any lawful issue; and that C. Doyle, W. Doyle, J. Doyle the younger, and E. Doyle were the only children living of the testator's daughter, C. Doyle.

On the 31st of July 1829 the Master found that the children of C. Doyle were presumptively entitled to the testator's real and personal estate, subject to the life interest of their mother in a moiety of the personal estate, and he ascertained what would be a proper allowance for maintenance during their minorities.

Upon the children of C. Doyle respectively attaining the age of twenty-one, orders were made for payment to them of the income of their respective shares in the real and personal estate of the testator; and upon the marriage of C. Doyle with A. T. Channer, and upon the death of J. Doyle the younger, orders were again made for the payment of the income of their respective shares in the real and personal estate of the testator to W. Doyle and Henry Ling, the trustees of the marriage settlement of C. Doyle; and to E. Doyle and A. T. Channer as the executors of the will of J. Doyle the younger.

On the 27th of July 1842, upon an order made on a bill of revivor filed on the 18th of December 1841, the Master found that H. H. Turner survived his co-trustee I. King; and that the trust estates and premises were vested in H. J. Turner and E. Layton, who were made parties to the suit, and he approved of W. Doyle and J. W. P. Field as new trustees of the real and personal estates, except the stock which had been paid into court.

On the 26th of July 1849, C. Doyle the

daughter of the testator and tenant for life of a moiety of the testator's personal estate, died ; and the order of the 10th of December 1849, now sought to be discharged, directed the taxation and payment of the costs of all parties, and provided for the payment of legacy duty. It also divided the sum of 15,677*l.*, 3*l.* 5*s.* per cent. annuities, and 4,046*l.* 1*s.* 10*d.* and some other sums, and directed the shares of the several parties entitled to be transferred to them, and it ordered that the title deeds of the real estate of W. W. Crowther, the testator in the cause, deposited in the Master's office, should be delivered to W. Doyle and J. W. P. Field, the new trustees, upon the trusts of the will of the said testator.

Mr. H. J. Turner and Mr. E. Layton, upon the petition to discharge this order, stated that in January 1842 they were served with an office copy of the bill of revivor, being the fourth suit, which did not pray a subpoena against them, but only that upon being served with a copy of the bill they might be bound by all the proceedings in the cause. That they did not appear, but that H. J. Turner wrote to the plaintiff's solicitor as follows :—" *Doyle v. Doyle*.—I think you have taken a wrong course in serving Mr. Layton and myself with office copies of the bill of revivor in this suit, instead of *subpoenas*. We shall not, however, appear to the bill, and thereby subject ourselves to the risk of costs, but shall, if we are so advised, at some future period, insist that we are not to be bound by the proceedings."

That in November 1842 a draft conveyance of trust property from Messrs. Turner and Layton to Watkin Doyle and John William Parker Field, as new trustees, was sent by the plaintiff, Edward Doyle, to Mr. Turner, for his perusal, on behalf of Messrs. Turner and Layton, but that they declined to execute it, except under an order of this Court, in a suit duly constituted.

A similar application was made in October 1849, but Messrs. Turner and Layton refused to convey the trust property to the new trustees. It also stated that Messrs. Turner and Layton, after the decease of W. W. Crowther, in consequence of doubts respecting the legitimacy of his children,

filed a supplemental bill, praying, among other things, that they might be protected and indemnified by the order of this Court in the performance of the trusts of the testator's will. It also stated that no copy of the petition upon which the order of the 10th of December 1849 was made, was served upon Messrs. Turner and Layton, and that no other notice was given to them, and that a portion of the stock had been transferred, as directed by that order, which they now sought to discharge.

Mr. Roupell and Mr. Barber, for Messrs. Turner and Layton.—The serving these parties with a copy of the bill under the twenty-third order of the 26th of August 1841 (1) was irregular; they were trustees, and the legal estate in the real property was vested in them; the parties to the suit had no right to call upon them to appear at the risk of costs; the petitioners, therefore, did not interfere until the parties sought to obtain the fund. The order made was irregular in directing the deeds to be delivered out of the Master's office to strangers without the knowledge of the trustees. The tenant for life of a portion of the fund had only just died, and no declaration of right had been made by the Court; a question under the will remained to be decided; pending the cause, parties had been found illegitimate, and the heir-at-law of the testator had not been brought before the Court. The whole of the proceedings had been irregular, and the order made ought to be discharged.

Mr. Turner and Mr. Hare, for W. Doyle and other parties to the suits.—The foundation of these suits is the will of W. Crowther, which this Court, by its decree in 1818, directed to be carried into execution. This was made in the presence of the trustees appointed by the testator; they were afterwards dismissed, and in 1826 new trustees were appointed. This was eight years after the decree, and the survivor of these derivative trustees is now represented by the petitioners; they must therefore come before the Court under the decree made in 1818. In 1829 again there was a decree made for maintenance, and that was followed by an order to pay

(1) Ord. Can. 171 ; 10 Law J. Rep. (N.S.) Chanc. 413.

the dividends of the funds to the parties entitled, and in like manner orders had been made to pay the dividends to the executor of a child who had died and to the trustees of the settlement of another who had married. The gift of these funds had been made to a party for life, with remainder to the children of that party, until the death of the tenant for life; therefore parties might arise who would be entitled. The present petitioners, who were trustees only of a dry legal estate, had been served with a copy of a bill of revivor; could these parties, who now said it was their duty to watch the proceedings, and who had notice of all that was going on, after eight years come and ask to set aside the whole of the proceedings? The Court had directed these trusts to be carried into execution, and the next-of-kin are the parties to contest the distribution. The object of these petitioners is idle; it is to disturb what has been done. In the case of a creditor, if he stood by he would be barred of his debt: why then was not a trustee who stood by without interfering in the proceedings to be prevented from setting them aside? It amounted to a waiver of all right to interfere.

Mr. Roupell, in reply.—Trustees could not be expected to appear at the risk of paying their own costs. The plaintiff had been guilty of the irregularity, the petitioners had done nothing which could be called a waiver, that irregularity had led to an order directing the delivery of the deeds, which were to pass away from the parties in whom the legal estate was vested.

THE MASTER OF THE ROLLS.—By this petition it is asked that all that has been done in these causes may be set aside. I should regret if anything unjust had been done, but that does not appear; it is now alleged that some of the trusts of the will were void. But the trustees of the will appointed under the decree cannot say that the trusts, the performance of which the Court has imposed upon them, are no trusts at all. If a positive order has been made that they shall convey the legal estate it is irregular against them, and if the Court has so adjudicated it is void in the result; but they say that nothing ought to stand under the irregularity complained

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of, the same as if it was to defeat the rights of the parties in the cause. Messrs. Turner and Layton had notice of what was to be done, and under such interest as they have they seek to destroy all that has been done; and yet it has been argued that the case is such that the Court would not have given them their costs if they had appeared, but on the contrary, that it would have made them pay the costs of appearing. It is with regret that I see such recklessness in trying to open the proceedings. The trustees, with notice, permitted the parties to proceed, and after an order made in pursuance of these proceedings they present this petition: had they chosen, they might have applied to this Court for leave to be heard upon the petition, which they now complain of as irregular; they might then, had they thought it material, have insisted that a copy of the bill of revivor should not have been served upon them, but as they did not think fit to appear, they cannot now be heard to say that no valid order has been made against them. As to the protection claimed against the delivery of the deeds, they were never in the hands of the petitioners, and they had no right which made it necessary for them to concern themselves. I can therefore make no order except to dismiss the petition, with costs.

L.C.
1849. } ANDREWES v. WALTON.
Nov. 22, 24.

Attachment—Arrest—Privilege—Discharge.

A party who had been arrested and taken to the Fleet on a writ of attachment for non-payment of costs, was discharged out of custody by consent, on the ground that he was privileged at the time of his arrest:—Held, that the issuing of a subsequent writ of attachment for the same costs, and an arrest thereunder, were regular.

The voluntary discharge of a party irregularly arrested, will not prejudice the right of the other party to enforce his demand by the same process or by a new writ.

This was a motion on the part of the plaintiff to discharge two several orders

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made by Vice Chancellor Knight Bruce, on the 8th of February and the 1st of March 1849, respectively, and that a writ of attachment tested on the 14th of February 1833, returnable immediately, and directed to the sheriffs of London against the plaintiff, and on which he was arrested on the 11th of March 1833, and committed to the Fleet, and on which he was still confined for non-payment of 107*l.* 19*s.* 2*d.* costs, might be set aside for invalidity; and that several orders refusing, with costs, various motions by the plaintiff for his discharge might be discharged; and that the plaintiff might be discharged out of custody in respect of such writ and certain subsequent detainers. The facts of the case were as follows:—

On the 10th of June 1831 the plaintiff's bill was dismissed, with costs. He then appealed to the Lord Chancellor, and on the 21st of December 1832 that appeal was dismissed, with costs. On the 12th of January 1833 an attachment was issued against him, directed to the sheriff of Middlesex, for non-payment of 107*l.* 19*s.* 2*d.*, taxed costs of the suit. On the 14th of January following he was arrested on this attachment, while he was attending the Registrar's office for the purpose of settling the minutes of the decree of the 21st of December 1832. The defendants, considering that the arrest might be held irregular on the ground of privilege, discharged him from custody on the 16th of January following, at the same time expressly informing him of the reasons for his discharge. A second attachment, directed to the sheriffs of London, and tested on the 14th of February 1833, was issued against him in respect of the same costs, and he was thereupon arrested upon the 11th of March following. On the 18th of March 1833 the plaintiff moved before the Vice Chancellor of England for his discharge, on the ground of irregularity. This motion and several other subsequent motions for the same purpose were refused, with costs. On the 18th of January 1849 the plaintiff moved, before the Vice Chancellor Knight Bruce, for a return by the sheriff of Middlesex of the writ of the 12th of January 1833, which was ordered. In pursuance of this order, the sheriff of Middlesex made his return, stating that he

had taken the plaintiff upon that writ, and had kept him in custody until the 16th of January 1833, on which day he received an order for his discharge from Mr. Milla, the Clerk in Court of the defendants, whereupon he permitted the said G. P. Andrewes to go at large.

On the 8th of February and the 1st of March 1849, the plaintiff moved, before Vice Chancellor Knight Bruce, for his discharge, on the ground that, after one writ executed by the sheriff no further writ could be regularly issued for the same debt. These motions were refused, and the plaintiff now moved by way of appeal before the Lord Chancellor.

On one of the previous occasions on which the case came before the Lord Chancellor in 1848, his Lordship directed several questions relative to the practice as to the issue and execution of writs of attachment for non-payment of costs to be referred to the Clerks of Records and Writs for their opinion thereon. The third, fifth, and sixth of such questions, and the respective answers thereto, were as follows:—

Third, Where the plaintiff's bill is by the decree dismissed, with costs, is the proceeding by writ of attachment the right mode, in the first instance, for recovery of the defendant's costs?—Answer. Yes.

Fifth, Is it open to the party to whom costs are payable to issue two writs of attachment returnable immediately, and running at the same time into the same county?—Answer. It is open to the party to whom costs are payable to issue two writs of attachment, returnable immediately, and running at the same time, but not in the same county. He might, before the return of an attachment, if unexecuted, have it altered, re-sealed, and re-entered; or, if it had not been delivered to the sheriff, he might, if for any cause desirable or necessary, on delivering up the first attachment to the officer sealing it (but not otherwise), have a new attachment to the same county, also returnable immediately, and the former would be destroyed. That one or other of the courses here described was pursued in *Andrewes v. Walton* is evident; for it has been ascertained (by one of the undersigned), upon a diligent and careful search at the Secondaries' office, that only one

attachment against Andrewes, for the 107l. 19s. 2d. costs in that cause, came into the hands of the sheriffs of London in the year 1833, namely, that tested the 14th of February in that year, and upon which he was arrested.

Sixth, Where a writ of attachment for non-payment of costs is executed by the party against whom it is directed being taken into custody, and afterwards set at liberty by the party issuing the writ, is it competent to that party, at any future time, of his own accord, to issue another writ of attachment for the same costs, leaving the first attachment in the sheriff's hands not returned and undischarged?

—Answer. This would depend upon the circumstances under which the party arrested was set at liberty. There might be an arrangement between the parties which left the matter open to a second arrest; or if the defendant was discharged on the ground of privilege alone, that would be no satisfaction of the contempt, and the party issuing the writ would be entitled, without having the attachment returned or discharged, to retake the defendant either upon that attachment or a new one, for which no order would be necessary. We are not aware of any reported cases upon this point in this court; but the subject has been frequently before the other Courts, and the practice there considered settled—see *Good v. Wilks* (1), *Plomer v. Ball* (2), *Barrack v. Newton* (3), *Phillips v. Price* (4); see also 8 & 9 Will. 3. c. 27. s. 7, upon which it has been held, that on a commitment upon an execution, be the escape voluntary or permissive, the plaintiff may have a new *capias* or any other execution against the defendant; and even persons arrested in execution, and by reason of privilege of parliament discharged, are, by statute 1 Jac. 1. c. 13, subjected to a second arrest when that privilege has ceased.

Mr. Wood and *Mr. Malins*, in support of the motion.—The point raised by this

motion is, whether, when a writ of attachment has been executed, it is possible to have a second writ for the same debt. It is settled that an attachment for non-performance of a decree is in the nature of an execution for debt—5 *Vin. Abr.* tit. 'Contempt,' D, pl. 10, *In the matter of M'Williams* (5), *The King v. Stokes* (6). At law a person cannot be taken in execution twice for the same debt—*Phelips v. Barrett* (7); and this right cannot be waived by the agreement of the debtor—*Blackburn v. Stupart* (8). So also in the case of an attachment executed for want of appearance—*Williams v. Townshend* (9), *Daniell's Ch. Pr.* vol. 1. p. 585, *Smith's Ch. Pr.* vol. 1. p. 128. If the plaintiff had come for his discharge then the defendants might have had a second attachment under the special circumstances, but the defendants voluntarily discharged him. The parties ought to have applied to the Court for liberty to issue a second attachment—*Robey v. White-wood* (10).

Mr. Macqueen, contra.—A discharge from arrest on the ground of privilege does not satisfy the debt—*Phillips v. Price*, *Good v. Wilks*. None of the cases relied upon by the plaintiff turn upon the ground of privilege. The first arrest being nugatory, the defendants were justified in discharging the plaintiff and issuing a second attachment.

Mr. Wood, in reply, said that the certificate of the Clerks of Records and Writs was a surprise upon him; and he distinguished the cases cited by the fact that in each of them the party arrested had applied to the Court for his own discharge.

Nov. 24.—The LORD CHANCELLOR.—One thing in this case is clear beyond doubt, that the plaintiff, being subject to an attachment for non-payment of costs, consequent upon the dismissal of his bill, was taken under circumstances that made

(1) 6 M. & S. 413.

(2) 5 Ad. & E. 823.

(3) 1 Q.B. Rep. 525; s. c. 10 Law J. Rep. (N.S.) Q.B. 182.

(4) 1 Dowl. & L. P.C. 110; s. c. 12 Law J. Rep. (N.S.) Q.B. 348.

(5) 1 Sch. & Lef. 169.

(6) 1 Cowp. 136.

(7) 4 Price, 23.

(8) 2 East, 243.

(9) 6 Sim. 296.

(10) 5 Beav. 399; s. c. 7 Beav. 77; 13 Law J. Rep. (N.S.) Chanc. 22.

it impossible for the parties to detain him, namely, at a time when he was privileged from arrest. The parties issuing the writ, seeing the difficulty they had got into, consented to the plaintiff's discharge. But then it was said that the plaintiff should have been brought up to the bar of the Court and discharged. It is no part of the duty of a party who has committed an irregularity to persevere in that irregularity, so as to cause a protracted imprisonment, which may subject himself to damages at law. The question is, whether the first *capias* so discharged the plaintiff that he could not be taken again.

It would be most injurious in its consequences to hold that the error of the sheriff's officer, in taking a party under circumstances under which he cannot be detained, should deprive the other party of his just demand; for the sheriff's officer can seldom know when the party is privileged or not; and there is a remedy against the person by action for damages. I will only observe in passing, that the cases of release, under the 11 Geo. 4. & 1 Will. 4. c. 36. have no application to the present case, which is one to be governed by the general practice of the Court. The cases cited by the officers of the Court distinctly shew what the practice of the Court is in a case like the present; that where there has been a taking which is irregular, and therefore nugatory, the prisoner, after his discharge, may be taken again upon the same process. The case of *Blackburn v. Stupart* is very distinguishable from the present case; for there, the party was regularly taken and discharged upon an agreement. I am of opinion that the plaintiff has made out no case for his discharge; and therefore the application must be dismissed.

The defendants then consented that the plaintiff should be unconditionally discharged from prison on account of his contempt; but that all orders touching the matters in question between the defendants and the plaintiff should continue in force against the plaintiff, except as to his imprisonment; and an order was made accordingly.

K. BRUCE, V.C. } SIBBERING v. THE EARL
Feb. 28; } OF BALCARRAS.
March 1.

Sale—Reversion—Undervalue—Delay.

An estate was settled on A. for life, with remainder to B. in fee. In 1822 B. sold his reversion to C. In 1830 A. died. In 1846 B. filed a bill to set aside the sale of the reversion on the ground of its having been sold at an undervalue. No evidence was given by B. to explain or account for the delay:—Held, that B. was barred by the lapse of time.

An estate was settled on A. for life, with remainder to B. in fee, subject to mortgages to C. and D. In 1822 B. sold his reversion to C. In 1823, in consideration of the mortgage debt due to C, the payment of D.'s debt by C, and the payment of a sum to A. by C, A, B, and D. conveyed the estate to C. Whether the transaction of 1823 did not prevent B. from availing himself of the rule in equity as to the sales of reversions at an undervalue—quære.

A small estate in Lancashire became vested in Robert Sibbering for life, with remainder to his son, Ralph Sibbering, in fee. Robert Sibbering and Ralph Sibbering joined in three mortgages of the property to Mr. Mawdesley, Mr. Gaskell, and Alexander Earl of Balcarras.

By an indenture, dated the 28th of June 1822, in consideration of 200*l.*, Ralph Sibbering conveyed his reversion in this property, expectant on the death of Robert Sibbering, to Alexander Earl of Balcarras. By indentures of lease and release, dated the 30th and 31st of October 1823, in consideration of the release by Alexander Earl of Balcarras of his mortgage debt and the payment by him of the mortgage debts due to Mr. Mawdesley and Mr. Gaskell, and of the payment by him of 100*l.* to Robert Sibbering, Mr. Mawdesley, Mr. Gaskell, Robert Sibbering, and Ralph Sibbering (who, with the Earl, were then the only persons entitled to the property) conveyed the property to the Earl in fee.

In 1825 Alexander Earl of Balcarras died, having devised this property to the defendant, James Earl of Balcarras.

In 1830 Robert Sibbering, the father, died.

The bill in this case, which was filed by Ralph Sibbering in 1846, prayed, that on payment to James Earl of Balcarras of 200*l.*, and interest, he might convey the property to the plaintiff, and account for the rents since 1830.

Evidence was given, on the part of the plaintiff, that he was in very distressed circumstances in 1822, the date of the conveyance, but no evidence was given as to the delay in filing the bill between 1830 and 1846.

Mr. Lloyd and Mr. Bennett, for the plaintiff, cited *Gowland v. De Faria* (1) and *Wood v. Abrey* (2), in support of the proposition that, in a sale of a reversion, the burden lay on the purchaser of proving that the price given for the property was a fair one, and that if he failed in doing this, he was bound to re-convey to the vendor, on being repaid the purchase-money; and contended that, as by the Statute of Limitations the owner of land was not barred at law until the lapse of twenty years, so the plaintiff here ought to have twenty years within which he might enforce this right in equity. On the question of lapse of time they cited—

Pickett v. Loggon, 14 Ves. 215.

Wood v. Downes, 18 Ves. 120.

Alfrey v. Alfrey, 1 Hall & Twells, 179; 1 Mac. & G. 87.

Mr. R. Palmer and Mr. Prior, for the Defendant, were not called upon.

Knight Bruce, V.C.—The bill in this case was filed in 1846, to set aside a sale which had been made by the plaintiff in 1822 of a reversionary interest, under such circumstances that, had it been a sale of an interest in possession, it could not, upon any principle of law or justice, have been set aside. It has been said, and not inaccurately, that this Court, whether upon sound principles or not, does certainly act with regard to sales of reversionary interests upon principles in some degree peculiar to them, and on principles not appli-

cable to the sale of interests in possession. The case must certainly be considered with due regard to this contention. I am, however, not at all sure that this case can be brought within the influence of these principles. It appears that in the year 1823 the father, the son, and certain incumbrancers, representing together the entire interest in the estate, both in possession and reversion, conveyed to a person under whom the present defendant claims and who had purchased the son's reversion. In this conveyance the son thought fit to join, it not being certain that that contract would have been carried into effect between the tenant for life and the mortgagees on the one hand, and the purchaser on the other, if the son had not joined. I am, therefore, not by any means satisfied that the principles peculiarly applicable to reversionary interests are applicable here.

Assuming, however, that they are, and assuming that the reversion was sold at an undervalue, how does the case stand? The tenant for life died in 1830, more than sixteen years before the filing of the bill. The purchaser died so long ago as 1825. The circumstances, condition, and history of the plaintiff during all the interval are entirely unexplained, except so far as an inference may legitimately be drawn from his condition previously to the sale. Under these circumstances, the Court is bound both by reason and authority to presume strongly in favour of the validity of the transaction. The very length of time affords evidence which it is the duty of a court of justice not to disregard. It has been said that, if the case were to be treated by analogy to the Statute of Limitations, the plaintiff would have twenty years after his father's death within which he might file a bill. It does not follow that, although a court of equity may consider itself bound, for certain purposes, by the Statutes of Limitations, it is bound to give relief in every case where, under analogous circumstances, the Statute of Limitations would not have applied at law. It is the duty of this Court to act upon the presumption which a court of justice most properly entertains against stale demands, and which can never be more properly applied

(1) 17 Ves. 20.

(2) 3 Madd. 417.

than in a case like the present, where, as it is contended, the burden of proof upon a most material point of controversy is thrown upon the defendant. I am of opinion that there is not here a case sufficient to resist a presumption in favour of the transaction arising from length of time, unexplained as it is since the death of the father, and that justice and reason require that the bill shall be dismissed, with costs.

K. BRUCE, V.C. }
March 14. } WACE v. BICKERTON.

Marriage Settlement — Covenants for Title—Infant.

Conveyance in a marriage settlement by A. of Whiteacre and Blackacre, on the usual trusts, and covenant by A. that the property was worth the annual sum of 200l., and that he was seised of it in fee simple, free from incumbrances. A. was entitled in fee simple to Whiteacre, which was worth 50l. a-year, but had only an estate for life in Blackacre, which was worth 190l. a-year. In a suit by the only child of the marriage against the executors of A., — Held, that the plaintiff was entitled, out of A.'s estate, not merely to a sum that would produce the difference between 50l. a-year and 200l. a-year, but to a sum that would produce 190l., the annual value of Blackacre.

If a bill on behalf of an infant does not ask for all the relief that he is entitled to, the Court will order a new bill to be filed.

In the early part of 1835 there was a treaty of marriage between Mr. Stephen Price and Miss Wace. On that occasion Mr. Thomas Price, the father of Mr. Stephen Price, made the following proposal, which was dated the 25th of June 1835 :— "Proposal for settlement of Mr. Stephen Price and M. A. Wace. Mr. Thomas Price proposes to settle an estate in or near Kinnerley parish, worth 200l. a-year, free from incumbrances, to himself for life, then to Stephen Price, chargeable with 50l. a-year in favour of Jane, wife of Thomas Price, for her life, then to M. A. Wace for life, then to all the children in such manner

as the father and mother shall appoint, and in default to all the children equally, and if no child to Stephen Price."

Indentures of settlement, dated in the month of June 1835, and made between Thomas Price of the first part, R. Wace, the father of Miss Wace, of the second part, Stephen Price of the third part, Miss Wace of the fourth part, and G. Dicken and H. T. Wace of the fifth part, were duly executed. The indenture of release commenced as follows :—"Whereas a marriage is intended to be had between the said Stephen Price and M. A. Wace, and, in consideration thereof, it has been agreed that the said Thomas Price shall make the settlement hereinafter contained. Now this indenture witnesseth, that in consideration of the said intended marriage and in consideration of 5s., &c. he, the said Thomas Price (with the privity and consent of the said Stephen Price, M. A. Wace, and Richard Wace) hath granted, released, directed, limited, and appointed, and doth, &c. unto the said G. Dicken and H. T. Wace and their heirs, all and every the messuages, lands, tenements, hereditaments, and premises of him the said Thomas Price, or of any person or persons in trust for him, in possession, reversion, remainder, expectancy, or otherwise howsoever, situate, lying and being in or near the parish of Kinnerley, to have and to hold the same messuages, lands, hereditaments and premises, unto and to the use of the said G. Dicken and H. T. Wace, their heirs and assigns for ever." The uses after the marriage were then declared to be—to the use of Thomas Price for life, with remainder to the use that Jane Price should take 50l. a-year, and, subject thereto, to Stephen Price for life, with remainder to Miss Wace for life, with the usual remainders for children, with a direction that, if there should be only one child, the estate should go to such child. The indenture then contained the following covenants :—"And the said Thomas Price does hereby, for himself, his heirs, executors and administrators, covenant with the said G. Dicken and H. T. Wace, their heirs, executors, administrators and assigns, and also with the said Stephen Price, his executors and administrators, that the said hereditaments are now worth the annual

sum of 200*l.*, and that he the said Thomas Price is entitled thereto for an estate of inheritance in fee simple in possession, free from all payments and incumbrances whatsoever, (except the said annuity of 50*l.*), and that he, the said Thomas Price, and his heirs, and all other persons who-soever shall and will, whenever requested by the said trustees, or any of them, execute any other deed or deeds that may be required for more effectually conveying the said hereditaments to the said G. Dicken and H. T. Wace, their heirs and assigns, upon and for the trusts and purposes hereinbefore mentioned. And, for further assurance, he the said Thomas Price and his heirs, all and every the said hereditaments hereby granted, released, and appointed, or intended so to be, unto the said G. Dicken and H. T. Wace, their heirs and assigns, against him the said Thomas Price, his heirs and assigns, and against all and every other person and persons whomsoever, shall and will warrant and for ever defend by these presents."

The marriage was solemnized on the 4th of July 1835. The wife of Mr. Stephen Price died in April 1836, leaving only one child, a daughter, named Mary Ann, who was one of the plaintiffs in this suit.

Stephen Price married again and died in 1846, leaving one child only by the second marriage, who was a son.

Thomas Price died in 1842, having left the defendants Mr. Bickerton and Mr. Onions his executors.

On the death of Thomas Price it appeared that, at the date of the settlement, he had been seised in fee of property in Kinnerley, worth only 57*l.* a-year. It appeared also that by indentures dated in May 1794 another estate, also situated in Kinnerley, and worth 190*l.* a-year, had been duly conveyed to the use of Thomas Price for life, with remainder that Jane his wife should take 50*l.* for her life, with remainder to the first son of the body of Thomas Price, and the heirs of the body of such first son, with remainder to the second and other sons in tail, with an ultimate limitation to Thomas Price in fee.

A bill was now filed by H. T. Wace, the surviving trustee of the settlement of 1835, and Mary Ann Price, the infant

daughter of Stephen Price, against the executors of Thomas Price, stating the above circumstances, and praying that it might be declared that, under his said covenants, Thomas Price was indebted to H. T. Wace, as such trustee as aforesaid, in such a sum as would be sufficient to make up, by its income, the difference between the annual value of the premises in or near the parish of Kinnerley aforesaid to which Thomas Price was seised for an estate in fee simple in possession, at the date of the said indenture, and the annual sum of 200*l.*

At the hearing of the cause it was referred to the Master to inquire what claim or demand, and to what amount, by way of damage or otherwise, the plaintiffs or either of them had against W. H. Bickerton and W. Onions as the legal personal representatives of Thomas Price, under the covenants contained in the settlement. The Master estimated the annual value of the fee simple estate at about 57*l.*, and that of the estate settled in 1794 at about 190*l.*, and found that there was due to the plaintiffs, in respect of damages, such a sum as would produce 190*l.* a-year.

To this report exceptions were taken by the defendants.

The cause now came on upon the exceptions and for further directions. The exceptions were first taken.

Mr. Bacon and *Mr. Elmsley*, for the exceptions.—First, the estate settled by the deeds of 1794 was not intended to be included in the settlement of 1835. Secondly, if it was so included, the Master ought to have found, as damages, such a sum only as would produce the difference between 200*l.* a-year and the annual value of the fee simple estate. Looking at the proposals and the settlement together, or looking at the settlement alone, it must be taken that the settlor intended a provision of 200*l.* a-year and no more. Why insert 200*l.* a-year unless that had been intended? If the estate settled in 1794 had been worth 2,000*l.* a-year, could it have been contended that Mr. Price would have been bound to give such a sum as would produce an income of 2,000*l.* a-year? The settlement is certainly inartificially

worded. It is a well established rule that the intention of an instrument should be gathered from every part of it. This rule ought to be held most strongly to apply to instruments such as this, which are inartificially worded. It would seem plain that the intention of Thomas Price, as derived from this instrument, was this:—"Whatever is conveyed shall go,—is entirely parted with;—but, if from any cause, what is conveyed should prove to be less than 200*l.*, I take on myself the liability of making up the difference between the income and 200*l.*"

Mr. Wigram and *Mr. Goodeve*, for the plaintiffs, contended that the estate settled in 1794 was included in the conveyance, and that this appeared by the mention of the 50*l.* a-year, and that the covenant applied to both estates.

Mr. Wetherell, for other parties.

KNIGHT BRUCE, V.C.—It is impossible for me to look at the proposals. The settlement must speak for itself. It must be taken that both the entailed and the fee simple estates were included in the parcels. There is then a covenant that the settlor was seised in fee of all the parcels; the fact being that he was not so seised. The Master had to consider the amount of damages, and he has taken the value of the entailed estate at the death of the settlor. Subject to his estimate of the value, I think that he could not have done otherwise.

The cause then came on for further directions.

Mr. Bacon and *Mr. Elmsley* then contended that, according to the form of the bill and the prayer, the plaintiffs contemplated only the difference between the 200*l.* a-year, and the annual value of the fee simple estate. There was not a suggestion of any claim for the value of the estate settled in 1794. The plaintiffs having defined the relief they asked, could not be allowed to go beyond it.

KNIGHT BRUCE, V.C. read the following passage from Lord Redesdale's treatise:—"If the person who thus acts as friend of

an infant does not lay his case properly before the Court, by collusion, neglect or mistake, a new bill may be brought on behalf of the infant; and if a defect appears on the hearing of the cause, the Court may order it to stand over, with liberty to amend the bill,"—*Red. Plead.* 4th ed. p. 27; and said that, if the argument of the defendants should prevail, he should not only give liberty to the plaintiffs to file a new bill, but should order such bill to be filed. He then put it to the defendants' counsel whether they would, after that intimation of opinion, waive the objection.

Mr. Bacon consented to waive the objection.

Mr. Bacon and *Mr. Elmsley* then stated the following question:—By the deeds of 1794, the estate therein comprised was settled on Thomas Price for life, remainder to Stephen for life, with remainder to the heirs of the body of Stephen. The infant son of Stephen is now tenant in tail of this property. If, however, this son should die without issue, and without barring the entail, the property will, under the settlement of 1794, go to the infant plaintiff. In this event the infant will have both the estate and compensation for the loss of the estate. This would clearly be unreasonable. Some provision ought to be inserted in the decree to meet this possible case.

Mr. Wigram and *Mr. Goodeve* contended that there ought not to be any qualification inserted.

KNIGHT BRUCE, V.C. said that he thought that the question ought to be left open, without, however, deciding or intimating any opinion on it. He thought that a proper sum should be carried over to the credit of the cause, and that the income should be appropriated for the benefit of the infant plaintiff, but that this was to be without prejudice, in the event of the death without issue of the brother of the plaintiff, to any question as to the rights, if any, in the capital fund directed to be carried over.

K. BRUCE, V.C.
1849.
Nov. 16.

In re THE LONDON,
BRIGHTON AND SOUTH
COAST RAILWAY COM-
PANY, *ex parte* WIL-
KINSON.

Annuity—Corpus of Fund.

Bequest of a chattel leasehold house to trustees, on trust to pay to A. an annuity for her life; and after A.'s death to be possessed of it on certain trusts. The house was taken by a railway company, and the purchase-money was paid into court:—Held, that A. was entitled to have the corpus of the fund broken in upon for the purpose of obtaining payment of some arrears, and the payment for the future of the annuity in full.

Elizabeth Palmer, by her will, dated the 20th of April 1838, gave six chattel leasehold tenements, therein mentioned, to trustees, upon trust, in the first place to pay the ground rent and other expenses, and then to pay to Ann Wilkinson an annuity of 52*l.* for her life, by equal weekly payments, free from taxes, and clear of all other deductions whatever, the first weekly payment of the said annuity to begin and be made on the Saturday next after the death of the testatrix; and, subject to the annuity, to pay the surplus (if any) of the rents to Elizabeth Phillips for her life, and after her decease to stand and be possessed of the leasehold premises upon the trusts therein mentioned.

The houses were taken by the London, Brighton and South Coast Railway Company, for the purpose of a railway, for the sum of 1,100*l.* which was paid into court and invested.

A petition was now presented by Mrs. Wilkinson, praying that the arrears of her annuity (which amounted to 150*l.*) might be paid out of the fund in court, and that, for the future, her annuity of 52*l.* might be paid by means of the dividends and the corpus.

Mr. Russell and Mr. Chandless, for the petition.

Mr. Bacon and Mr. Rogers objected to the corpus of the fund being broken in upon, and cited *Foster v. Smith* (1).

(1) 1 Phill. 629; a. c. 15 Law J. Rep. (N.S.) Chanc. 183.

Mr. J. T. Humphry, for the trustees.

Knight Bruce, V.C.—Although the whole of the property was a chattel leasehold, it does not necessarily follow that, had this act of parliament not passed, and had the property remained unsold, the annuitant could not have required a sale. Upon this I avoid pronouncing or intimating any opinion. This, however, I may say that, had the act not passed, and had the property remained unsold, those entitled to the property, subject to the annuity, never could have claimed anything unless full payment of the annuity and all the arrears had been made, either during the term or at the end of the term. This being so, the question is whether, the property having been compulsorily sold under the provisions of an act of parliament, and the annuity being in arrear, the annuitant is to wait for payment, or is entitled to have the arrears raised out of the corpus of the money, an enduring fund, which represents, by means of the act, a perishable fund. I am of opinion that she is entitled to be paid out of the corpus, and provision must therefore be made accordingly by the trustees. This decision, I think, is quite consistent with Lord Lyndhurst's decision in *Foster v. Smith*, in contravention of which I shall certainly not knowingly or willingly decide.

K. BRUCE, V.C. }
1849. } *Ex parte* TOURNAY.
Dec. 20.

Trustee Act—Repayment of the Trust Fund to the Trustee.

A testator made certain dispositions of his property by his will, and died in 1845. In 1848 A, one of the executors, upon the death of the executor who had acted up to that time, proved the will, and paid a sum of money into court under the Trustee Act. Upon petition by A. that the money might be repaid to him, for the purpose of discharging certain liabilities of the testator which he had recently discovered, an order was made accordingly.

Joseph Newington, by his will, dated the

21st of October 1844, made the dispositions therein contained, and appointed his widow, Mr. Tournay, and another person his executors, and died in 1845. The will was, soon after the death of the testator, proved by his widow alone. The widow died in 1848. Upon the death of the widow, Mr. Tournay proved the will and paid into court, under the Trustee Act (10 & 11 Vict. c. 96.) the sum of 1,915*l.* upon the trusts of the will.

A petition was now presented, by Mr. Tournay, stating the above circumstances, and stating also that, after the money had been so paid in, he had discovered debts and liabilities of the testator to a considerable amount, and praying that the money might be paid out again to him, in order that he might apply it in discharging them.

Mr. G. W. Collins, for the petitioner.

Mr. E. J. Lloyd, *Mr. Hardy*, and *Mr. R. W. Moore*, for the several petitioners interested in the residuary estate.

KNIGHT BRUCE, V.C. made the order, upon the petitioner undertaking properly to apply the fund.

L.C. { *In re* THE UNIVERSAL SAL-
Jan. 12, 14. { VAGE COMPANY, *ex parte*
THE EARL OF MANSFIELD.

Company—Winding-up Act, 1848—Contributory.

A. applied verbally for shares in a joint-stock company and twenty scrip certificates were sent to him, the receipt of which he acknowledged by letter and paid the deposit, but he did no further act in relation to the company. Under an order for winding up the affairs of the company,—Held, that A, though he had not signed the deed, was a contributory.

A party placed on the list of contributories is not necessarily liable thereby to all the losses and expenses of the company, but only to such as have been properly incurred by the directors.

Under an order for winding up the affairs of the Universal Salvage Company, under the Joint-Stock Companies Wind-

ing-up Act, 1848 (1), the Master to whom the matter had been referred had excluded the name of Lord Mansfield from the list of contributories; but, on motion before the Vice Chancellor Knight Bruce, an order was made that Lord Mansfield's name should be inserted in the list of contributories, in respect of twenty shares.

The present application was to discharge that order of the Vice Chancellor.

In 1844, a scheme was formed for the establishment of the Universal Salvage Company; and a prospectus was issued, stating that the company was to consist of 4,000 shares of 25*l.* each. The company was afterwards provisionally registered. In June 1845, Lord Mansfield applied, through his brother, Mr. Murray, (who was a provisional director,) for an allotment of shares, and twenty scrip certificates were shortly afterwards forwarded to him, the receipt of which he acknowledged by a letter of the 30th of June, addressed to the secretary of the company, his Lordship having previously remitted 100*l.* to the company, in payment of the deposit of 5*l.* upon each share.

On the back of the provisional certificates were certain printed conditions, first, that the capital of the company should consist of 100,000*l.* divided into 4,000 shares; secondly, that the holder of the scrip should be entitled to profits; and, thirdly, that in case of calls being made and not paid within thirty days after the day fixed for payment, the shares with all payments already made thereon would be forfeited.

In July 1846, notice of a call was served upon him in respect of his twenty shares; as also notices from time to time of the proceedings of the company; but these notices were disregarded, and no further act was done by his Lordship to make himself liable to the company, and no proceedings were taken by the company either to enforce the call or to forfeit the shares. The deed of settlement of the company bore date the 18th of August 1845, and was completely registered in January 1846; and in the schedule to that deed Lord Mansfield's name appeared as the owner of twenty shares. This schedule containing errors as to the distinctive numbers of the shares respectively allotted

to the subscribers, on the 12th of September following a corrected schedule was filed, pursuant to the 7 & 8 Vict. c. 110.

A number of affidavits were attempted to be used in support of the motion, which were to the effect that the whole number of shares mentioned in the prospectus were never issued, and that the directors had commenced business with a much smaller capital, and that in consequence thereof the concern had ultimately failed; but as these affidavits and the facts contained in them did not appear upon the Master's certificate, the Lord Chancellor declined to receive them.

Mr. Malins and *Mr. Glasse*, in support of the motion, contended that the object of the Winding-up Act was not to create any new liabilities, but only to provide a more expeditious way of enforcing existing rights and liabilities; that it was clear that (except for the act) Lord Mansfield had not rendered himself liable either to the creditors of the company, or to the demands of the company; but that he had merely secured the right to elect whether he would accept the shares or forfeit his deposit; that the directors, having commenced business before the whole number of shares were issued, had acted without authority, and that the subscribers were not liable to make good their losses; and they cited—

Fox v. Clifton, 6 Bing. 776; s. c. 8 Law J. Rep. C.P. 257.

Walstab v. Spottiswoode, 15 Mee. & W. 501; s. c. 4 Rail. Cas. 321; 15 Law J. Rep. (n.s.) Exch. 193.

Wontner v. Shairp, 4 C.B. Rep. 404; s. c. 4 Rail. Cas. 542; 17 Law J. Rep. (n.s.) C.P. 38.

Nockells v. Crosby, 3 B. & C. 814.

Pitchford v. Davis, 5 Mee. & W. 2; s. c. 8 Law J. Rep. (n.s.) Exch. 157.

Bell v. Lord Mexborough, 5 Rail. Cas. 149; s. c. 17 Law J. Rep. (n.s.) Chanc. 296.

Mr. J. Russell and *Mr. Prendergast*, for the official manager, in support of the order, contended that Lord Mansfield, by applying for shares, acknowledging the receipt of the scrip certificates, and paying his deposit, had rendered himself liable as

a member of the company—*Ex parte Sadler* (2) and *Clements v. Todd* (3). If the company had been successful, Lord Mansfield could have come against the directors for his share of the profits, therefore the converse must hold good.

Mr. Malins, in reply, said, that Lord Mansfield could have had no right to call for a share of the profits, as he had not fulfilled the conditions, and that the company could not have sued him for any calls, because they had not carried out the project according to the terms of the prospectus—*Prendergast v. Turton* (4).

The LORD CHANCELLOR.—A great deal of the argument in this case is founded upon facts contained in affidavits which do not appear on the Master's report; but in deciding this case I shall confine myself to what appears in that report. The question is, whether Lord Mansfield is liable to any portion of the expenses incurred. The facts of the case are, that Lord Mansfield applied verbally by his brother for shares in the company, and that the company agreed to give him twenty shares, and informed him thereof by letter; and Lord Mansfield thereupon paid the deposit upon the shares he had so applied for, and was registered according to the act. It was said, that Lord Mansfield was not liable to be sued by a creditor of the company; but by the 3rd section of the Winding-up Act, contributories are defined, as either members of the company, or as persons liable to contribute to the payment of any of the debts of the company. By taking shares or purchasing scrip which specifies that he is entitled to a share of the profits, does he not become a member according to the sense of the act? I am of opinion that no case whatever has been made for considering Lord Mansfield otherwise than as a contributory, as far as appears from the Master's report.

It appears, however, to have been thought that the moment a party's name was put on the list, he was liable for all the losses

(2) 15 Ves. 52.

(3) 5 Rail. Cas. 132; s. c. 17 Law J. Rep. (n.s.) Exch. 31.

(4) 1 You. & C. C.C. 98; s. c. 11 Law J. Rep. (n.s.) Chanc. 22.

of the company proportionably. But that is not so, according to the true construction of the Winding-up Act. For when the Master has settled the list of all persons liable to contribute, then a new duty is imposed upon him, namely, to distribute amongst those parties the shares or proportions in which they are liable to contribute among themselves. The persons on the list would be liable for everything that had been done by the directors properly and in the due execution of the scheme; but it may be, that at a subsequent period the directors had departed from the scheme without authority; and in that case, subscribers who had not sanctioned those proceedings would not be liable to bear any part of the expenses so incurred as between themselves and the defaulting directors. That question may arise before the Master in the execution of the second part of his duty, namely, in distributing the losses among the contributories liable thereto.

Lord Mansfield's name must be kept on the list of contributories; but it may be referred back to the Master to review his report in order that the facts may more clearly appear.

L.C. { *In re* THE MADRID AND VALEN-
Jan. 17. { CIA RAILWAY COMPANY, *ex*
 { *parte* JAMES.

*Company — Winding-up Act, 1848 —
Foreign Railway—English Shareholders.*

A company was formed for making a railway in Spain, with a board of directors both at Madrid and in London; the locale of the company to be in Spain, and its affairs to be regulated by the commercial code of Spain; two-thirds of the capital to be subscribed by English shareholders and the remaining one-third by Spanish shareholders:—Held, that such a company was within the scope of the Joint-Stock Companies Winding-up Act, 1848, as far as regarded the English subscribers.

This was an application to discharge an order, made by the Vice Chancellor Knight Bruce, for winding up the affairs of the Madrid and Valencia Railway Company. In 1845, a company was formed for the

purpose of making a railway from Madrid to the city and port of Valencia. It was stated in the prospectus that the capital was to consist of 2,400,000*l.*, divided into 120,000 shares, of 20*l.* each, and that two-thirds of the capital were to be appropriated to the English shareholders, and one-third to the Spanish shareholders; that the *locale* of the company should be in Spain, and that it would be formed on the principles of a *compañía anonima*, agreeably to the commercial code of that country.

By an ordinance of the Queen of Spain, dated in July 1845, the Spanish Government conceded to one P. B. De Volney the right to construct the railway, and to take certain Government lands for that purpose; and the rights thus acquired had been assigned by De Volney to a trustee for the company.

The administration of the company was to be by a council of government and a director resident in Spain and a board of directors in London.

It appeared that the one-third of the shares to be attributed to Spanish shareholders had not been taken up, and the deposits on those which had been issued had been returned, by the directors in Spain, to the depositors; and of the shares attributed to English shareholders, the amount issued was far below two-thirds of the estimated capital of the company.

The principal question raised upon the motion was, whether a company so situated was within the scope of the Joint-Stock Companies Winding-up Act (1).

Mr. J. Russell and *Mr. Glasse*, in support of the motion.—This company cannot be brought within the provisions of the act: first, because the *locale* of the company is in Spain, and its operations are upon Spanish soil; and secondly, because the affairs of the company are regulated by a board of directors at Madrid, and under the laws of a foreign country—*Story's Conflict of Laws*, s. 280.

[The LORD CHANCELLOR.—The first objection would apply equally to a steam navigation company in the Pacific, for instance, carried on with English capital. Is it not within the act, because it is out of the limits of the empire?]

(1) 11 & 12 Vict. c. 45.

If that is so, the Court in its discretion will not put the machinery of the act into operation, seeing that it cannot reach the board in Spain, and the Spanish shareholders are not amenable to this jurisdiction, and that the order for a dissolution will work a forfeiture of the caution-money, 20,000*l.* and upwards, deposited by the company in the Government Bank of Spain.

The LORD CHANCELLOR said that he was clear that the company was within the scope of the act. Though the principal works were to be done in Spain, yet here there was an English company formed to assist in carrying out those works. He was also quite clear that there was sufficient evidence to shew the cessation or abandonment of the undertaking. It was strong evidence of that fact that the directors in Spain had come to a resolution for discontinuing the project, and had therefore returned their capital to the Spanish shareholders. The contract between the parties was, that the whole work should be prosecuted; and the subscribers paid their money on the faith that the whole of the necessary sum would be raised; but the directors had precluded themselves from prosecuting the works by their own act in reducing the capital by one-third below the necessary amount. The mere act of so reducing the capital would of itself bring the company within the provisions of the Winding-up Act.

It was finally arranged between the parties that the order of the Vice Chancellor should be discharged upon payment by the appellants to the petitioners of all the sums they had subscribed, together with their costs.

Mr. Bacon, Mr. Welford and Mr. Logie, and Mr. Malins and Mr. J. H. Palmer, appeared for the petitioners.

M.R.

Jan. 31;

Feb. 7.

HARGRAVE v. HARGRAVE.

Infant—Reciprocity, Want of—Counsel's Consent—Trial at Law—Compromise—Agreement—Client's Rejection.

A bill was filed to establish the right of an infant to a moiety of an estate. At the

hearing of the cause an issue was directed to ascertain the legitimacy of the plaintiff, upon which his right depended. Before the trial commenced an agreement for a compromise was entered into, and signed by the counsel both of the plaintiff and the defendant, by which the estate was to be divided equally between their respective clients, each of whom was to pay his own costs. The defendant consented to carry the agreement into effect, but he subsequently refused to abide by it:—Held, that from the want of reciprocity the Court would not interfere unless it were for the benefit of the infant; but that, as this agreement was beneficial to the infant, the Court would have given its sanction to it; but, in consequence of the want of reciprocity arising from the plaintiff's infancy, the Court refused to enforce the agreement upon the withdrawal of the consent of the defendant: that the counsel of the defendant had an implied authority to enter into the agreement; that an order of Court to give effect to it was not necessary; and that the defendant must pay so much of the plaintiff's costs of preparing for the trial as became useless by the refusal of the defendant to carry out the agreement; that the former order must be continued and the trial proceeded with; and that the costs of the petition, on which the order was made, must be costs in the cause.

This bill was filed by John Robert Hargrave, an infant, by Mary Hargrave his mother and next friend, against William Josceline Hargrave and others to establish his right as tenant in common in tail in possession with the defendant W. J. Hargrave to one undivided moiety of a freehold estate, known as the Saracen's Head Inn, Aldgate, which was devised by the will of Thomas Hargrave to his son John for life, with remainder to trustees to preserve contingent remainders, with remainder to the use of all and every the child and children of his said son as tenants in common, and of the heirs of their several and respective bodies.

W. J. Hargrave disputed the legitimacy of the plaintiff, and claimed the entire interest in the estate as the only child of J. Hargrave the testator's son; and upon the hearing of this cause it was ordered that the parties should proceed to a trial

at law, in the Court of Common Pleas, of an issue, whether the plaintiff was the child of J. Hargrave.

On the 10th of February 1846, upon the trial of such issue, a verdict was found for the plaintiff.

On the 12th of June 1847, upon the motion of the defendant W. J. Hargrave, a new trial of the issue was directed to be had in the Court of Common Pleas, and on the 22nd of June 1848, upon such second trial coming on, a verdict was found for W. J. Hargrave.

On the 12th of January 1849, upon the motion of the plaintiff, a third trial of the issue was directed to be had in the Court of Common Pleas, and preparations having been made, this came on upon the 19th of June 1849, but before the trial commenced, the counsel for the plaintiff and the defendant signed the following agreement: "The entire estate to be equally divided between the plaintiff and the defendant, each party to bear all his own costs. The defendant to retain all rents received by or for him prior to the appointment of the receiver. (1) The fund in the Court of Chancery, and in the hands of the receiver, to be equally divided between the plaintiff and the defendant. Rule of this court, if necessary, to be drawn up for enforcing these terms. Order of Court of Chancery if necessary."

Each party withdrew a juror upon the signing this agreement, and the trial was not proceeded with.

Further articles of agreement were afterwards prepared for effectuating the agreement of counsel. This was forwarded to the solicitor of the defendant, but he refused to carry out the compromise, upon which the plaintiff presented this petition, praying that in case this Court should think fit to sanction, and the defendant should elect or submit to confirm and carry out the compromise, then that it might be referred to the Master to approve of a proper instrument for that purpose, or in case the Court should not think fit to sanction, or the defendant should not elect or submit to confirm and carry out the compromise, then that the petitioner might be at liberty to proceed to a new trial of the issue as

directed by the order of the 12th of January 1849, in like manner as if the trial thereby directed had been postponed with the leave of this Court; and that the defendant W. J. Hargrave might be ordered to pay to the petitioner his costs of the preparation for the trial on the 19th of June 1849, and consequent thereon, and of this present application.

This petition was supported by an affidavit stating that the defendant had at first promised to carry out the agreement signed by counsel, but that he subsequently refused to do so.

Mr. Turner and Mr. Kyle, in support of the petition.—The question to be considered is, how far a party is bound by an agreement entered into by counsel on his behalf. The defendant is an adult, and if the Court saw that it was beneficial for the infant, it would order the agreement to be carried into effect. There are several cases in which parties have been held bound by the consent of their counsel.

In re Hobler, 8 Beav. 101.

Elworthy v. Bird, 2 Sim. & S. 372; s. c. Tam. 44; 3 Law J. Rep. Chanc. 190; 13 Price, 222; 3 Law J. Rep. C.P. 260.

Mr. Lloyd and Mr. Glasse, contra.—The agreement signed by counsel cannot bind the defendant. It was made without any authority express or implied; but assuming they had any authority to sign the agreement, it cannot bind the defendant unless an order was made upon it. The consent of counsel also cannot bind the client beyond the issue in question in the suit, and it has always been held to have reference to the matters in issue in the cause, which in this case relate to the legitimacy of the plaintiff, while the agreement made related to the division of the estate, which was not in issue in the cause.

Mole v. Smith, 1 J. & W. 665, 673.

Furnival v. Bogle, 4 Russ. 142.

Colwel v. Child, 1 Ch. Ca. 86.

Colledge v. Horn, 3 Bing. 119; s. c. 10 J. B. Moore, 431; 3 Law J. Rep. C.P. 184.

Porter v. Cooper, 1 Cr. M. & R. 387; s. c. 3 Law J. Rep. (n.s.) Exch. 330.

Iggulden v. Terson, 2 Dowl. P.C. 277; s. c. 4 Tyrw. 309.

(1) *Vide* 15 Law J. Rep. (n.s.) Chanc. 280.

Filmer v. Delber, 3 Taunt. 486.

Davenport v. Stafford, 8 Beav. 503 ;
s. c. 14 Law J. Rep. (N.S.) Chanc.
414.

Mr. Turner, in reply.

THE MASTER OF THE ROLLS.—In this cause the plaintiff, an infant, claims to be one of two children of John Hargrave deceased, and in that character to be entitled to one moiety of an estate comprised in the will of Thomas Hargrave. The defendant, a son of J. Hargrave, denied that the plaintiff was the legitimate child, and brought forward facts tending to shew that he was illegitimate, and not the child of J. Hargrave the father of the defendant. On the hearing, the circumstances were such as to throw considerable doubt upon the question ; it therefore appeared to me necessary to direct an issue to be tried in a court of common law to ascertain whether the plaintiff was the legitimate child of J. Hargrave. Two trials were had, and were not considered satisfactory ; it became necessary to go again before a jury, and another issue was directed ; preparations were accordingly made, and the issue was ready for trial on the 19th of June 1849 ; but before it commenced, the counsel for the two parties signed an agreement for compromise.

With a very slight exception this comprised the whole relief which the plaintiff sought by the bill. The trial at common law was merely auxiliary to the proceedings in this suit. It is impossible to believe that the gentlemen engaged in the trial were not perfectly aware of what was the real matter in controversy between the parties, or that they were not instructed in full ; and the particular difficulty I have felt about the agreement which the counsel for the parties came to, is, that the plaintiff is an infant. According to the rule adopted in this court, an agreement entered into between an infant and an adult, in which, in some respects, there is no reciprocity, the Court will not decree the specific performance by the infant, and, therefore, if this agreement had been entered into with perfect authority from all parties, and it was afterwards departed from by the defendant,

it is not unreasonable to doubt whether such an agreement as this could be enforced by this Court, and, in consequence of that, perhaps the specific performance would not be granted, if asked for. By the prayer of this petition that is not sought for, unless the defendant should consent. From the want of reciprocity, unless at the same time it were an agreement beneficial to the infant, who was a suitor, the Court would not interfere ; but it seems to me so perfectly clear that this agreement must, in one sense, have been beneficial to the infant, not as giving him a right which otherwise he might not have had,—not as giving him a right which he could not have obtained against the defendant adversely,—but as giving him that right to such an extent that it must have been valuable to him to receive it then, instead of being subject to further expense, delay, and uncertainty ; and it is a case, therefore, that the Court would have interfered in and given effect to it on the part of the plaintiff.

From the affidavit made, the defendant does not deny, and I cannot doubt but that, irrespective of the general authority which counsel have, there was, either previously or subsequently, it matters not which, an adoption by the defendant, and a consent given by him to the agreement entered into by counsel. It is expressly said, on the part of the plaintiff, and not denied by the defendant, that he did at one time consent, but afterwards refused so to do. In this state of things, the trial of the issue was put off, each party consented to withdraw a juror, and they did each accordingly withdraw a juror ; and, therefore, by that, the common act of both, founded upon this agreement, the further proceeding on that issue was rendered impracticable. The proceeding on that trial having been rendered impracticable, the defendant says, " I dissent from that agreement, and I, as one party to it, will not carry it into effect ; the plaintiff is an infant, and it is an agreement for a specific performance, which does not bind an infant." The consequence of that refusal is, that by the act of the defendant the whole of the expense which was incurred in the preparations for that trial, was in-

curred in vain, except so far as those preparations may be made available for a future trial. How much of such preparations may be made use of on a subsequent trial, I think is a material consideration in the respect of costs.

It has been objected on behalf of the defendant, that counsel's authority does not extend beyond the very subject-matter of litigation in the proceeding—that in this matter it only extended to the question of legitimacy, which was the issue directed; that his counsel could not bind him in the terms set forth in this agreement. In this case the proceedings in the cause and the proceedings at the trial of the issue are so clearly and intimately connected, that I do not think this agreement, giving to the party a species of relief which is sought by the bill, can be considered as an agreement relating to a distinct matter; and I think, therefore, that the objection cannot prevail.

Another objection was taken on behalf of the defendant, that there was not an order made upon the agreement, and, therefore, that it is not binding. The cases cited do not, I think, maintain the objection; I think it has been determined not to be necessary that such an agreement should ripen into an order before it is made available. If no order was made upon it, is there not the act in court of the withdrawal by each side of a juror? And is there not the fact of the case being called on in pursuance of the agreement, and its not being proceeded with? I cannot look upon it in the view upheld on behalf of the defendant; and, therefore, the objection cannot prevail.

What, then, are the costs which ought to be paid by the defendant to the plaintiff? I think there ought to be a distinction made with regard to the circumstances which I have mentioned; and so much of the costs of preparing for the trial as by the defeat of the arrangement have turned out to be wholly unavailable for a new trial ought to be charged to the defendant, by whose act the costs have been uselessly expended.

With regard to the costs of the petition, I think I shall not do wrong to make them costs in the cause.

The order I therefore make is, that the

former order be continued; that the third trial of the issue shall be proceeded with in a manner similar to the former, and that the defendant shall pay to the plaintiff so much of the costs of preparing for the trial on the 19th of June 1849, including the court fees and costs of the jury, as cannot be made available for the trial of the issue to be had under this order, and that the costs of this petition shall be costs in the cause.

V.C. }
Feb. 15. } PARSONS v. BENN.

Witnesses, Examination of — Solicitor ordered to pay Expenses of Commissioner.

On a petition by the Commissioner appointed to examine witnesses in the cause, the solicitor for the defendants was ordered to pay the Commissioner's expenses in attending the commission, and the costs of this petition, although he had given no personal guarantee for the payment of such expenses.

This was the petition of William Woodcock, and it stated that the replication in the suit was filed on the 5th of March 1849, and that a commission for the examination of witnesses in the cause was issued on the 17th of the same month, and the petitioner and another person were appointed Commissioners. That Samuel Bamford Hamer acted as solicitor for the defendants. That the petitioner sat as Commissioner and examined witnesses on several successive days, and he afterwards applied to the said S. B. Hamer for payment of his expenses attending the said commission, which amounted to the sum of 20*l.* 5*s.*; but that such application had not been complied with. The petition prayed that it might be referred to the taxing Master to tax the said charge; and that the said S. B. Hamer might be ordered to pay the petitioner's said expenses and also the costs of this petition.

The affidavit of Mr. Hamer stated that he had acted as solicitor in the suit for two of the defendants. That he had never acted for the third defendant, R. J. Parsons; but another solicitor had acted for that defendant. That deponent had never

presented any witnesses for examination on behalf of the last-named defendant. That although he had acted in the matters relating to the commission in the capacity of solicitor for the first two defendants, yet he had never entered into any engagement personally, nor had he given any personal guarantie for the payment of the fees, charges, or expenses of the said commission; and he submitted that for these reasons the petitioner had no claim against him for his fees and charges in the said commission.

Mr. Harrison appeared in support of the petition.

Mr. Jervis, contra, submitted that the petitioner could not have a remedy against both the solicitor of the defendants and the defendants themselves; and cited the following case to shew that the Commissioners' remedy was only against the principal, and not against the solicitor, where there had been no undertaking by the solicitor to pay the costs—*Stockhold v. Collington* (1).

Mr. Harrison, in reply, cited *Ambrose v. Dumnow Union* (2), *In re Weaver* (3), and *Blundell v. Gladstone* (4). In the latter case a motion was made by the plaintiff's solicitor to restrain the plaintiff's Commissioners from proceeding with actions against him for fees claimed by them as such Commissioners. The solicitor had offered to pay the Commissioners a certain sum, but they claimed a larger amount on account of having performed extra work. The Vice Chancellor restrained the actions, but made a reference to the Master to ascertain what was due to the Commissioners for their fees.

The VICE CHANCELLOR referred to *Blundell v. Gladstone*, but considered that the object in that case was different from what appeared upon this petition. It seemed to him to follow, as of course, that the order asked on this petition would be the right order to make.

M.R. }
1849. } JODRELL v. JODRELL.
Nov. 16. }

Bill—Scandal and Impertinence—Expunging after Exceptions allowed to the Master's Report.

The Master's report finding the plaintiff's bill scandalous and impertinent was, upon exceptions taken both by the plaintiff and defendant, varied by the Court:—Held, that the 41st General Order of May 1845 did not apply to this case, and an order was made directing the Record and Writ Clerk to expunge those parts of the plaintiff's bill, which the Court considered scandalous and impertinent.

This was a motion on behalf of the defendant, that the Record and Writ Clerk might expunge from the bill so much thereof as this Court had decided to be scandalous and impertinent, or impertinent.

The defendant took exceptions to the plaintiff's bill for scandal and impertinence.

On the 19th of June 1849, the Master, in pursuance of a reference made to him on the 17th of March, certified that the plaintiff's bill was scandalous and impertinent, and also impertinent in some of the points excepted to, but that it was not scandalous and impertinent, or impertinent, in other points excepted to. Both the plaintiff and the defendant excepted to this report, and on the 24th of July 1849 the Court varied the Master's finding, and allowed some of the exceptions taken both by the plaintiff and the defendant.

Upon applying to the Record and Writ Clerk to expunge those parts of the plaintiff's bill which the Court had decided to be scandalous and impertinent, and impertinent, he considered that he had no authority to do so without an order of this Court.

Mr. Freeling, in support of the motion.—This case does not fall within the 41st General Order of May 1845 (1), and it does not seem to be provided for.

The MASTER OF THE ROLLS.—You may take the order. I do not think that any of the Orders apply to this case.

(1) 1 Salk. 330; a. c. Carth. 208.
(2) 8 Beav. 43.
(3) 2 M. & Cr. 441.
(4) 9 Sim. 455; a. c. 8 Law J. Rep. (N.S.) Chanc. 109.

(1) Ord. Can. 300; 14 Law J. Rep. (N.S.) Chanc. 288.

L.C.
1849.
Dec. 12, 13, 15. } THE ATTORNEY GENERAL
v. JONES.

Probate and Legacy Duty—Lighthouse Dues—Franchise.

The profits arising from duties received under the grant of a lighthouse to be maintained in a specified place, savour of the reality, and are not liable either to probate or legacy duty.

In 1713, William Robinson demised to William Trench the island called Skerries, for the term of ninety-nine years, at the yearly rent of 10*l.* during the period that a lighthouse should be in the course of erection, and at the yearly rent of 20*l.* for the remainder of the term. By letters patent of Queen Anne, dated the 13th of July 1714, reciting that the erection of a lighthouse on the Island of Skerries would be of public advantage, and that William Trench was possessed of the said island for a long term of years, and was willing at his own expense to erect and maintain a lighthouse thereon, it was witnessed, in consideration of the expense of erecting and maintaining the said lighthouse, and in consideration of a certain rent thereby reserved, and of the covenants of the said William Trench, Her Majesty granted unto William Trench all that the free liberty, power and authority of erecting and maintaining a lighthouse with lights therein continually burning in the night season upon the said island, and also full power and authority to take certain duties from vessels passing the said lighthouse; to have, receive and enjoy all the said duties unto the said William Trench, his executors, administrators and assigns, from the date of the letters patent for the term of sixty years thence next ensuing, paying to the Crown the yearly rent of 5*l.*, with a proviso that in case William Trench, his executors, &c. should not within five years erect a lighthouse upon the said island, or should at any time afterwards suffer the lighthouse to go into decay, and should not keep lights burning therein, then the grant should be void.

By an act passed in the 3 Geo. 2, reciting the erection of the lighthouse and the death of William Trench, and the con-

veyance of all rights under the said letters patent and the lighthouse to Sutton Morgan, his heirs and assigns, and that the annual expense of maintaining the said lighthouse had far exceeded the duties received, and that it was judged absolutely necessary that the said lighthouse should be kept up and preserved after the said term of sixty years, it was enacted that the powers and duties granted by the letters patent should have continuance after the said term of sixty years for ever, and should be fully and absolutely vested in Sutton Morgan, his heirs and assigns. The act then provided for an increased rate of tolls and for the means of enforcing payment of the same; and that Sutton Morgan, his heirs and assigns, should be discharged from the quit rent of 5*l.*, payable to the Crown. In 1810, by a deed of arrangement between Morgan Jones, who was then entitled to the lighthouse dues, and one Floyer, the heir-at-law of William Robinson (the lessor) it was agreed that two-thirds of the lighthouse dues and the entirety of the property in the island of Skerries should belong to Morgan Jones, and the remaining one-third of the dues should belong to Floyer. In 1837, Morgan Jones the younger, being entitled to two third shares of the lighthouse dues, by his will dated in that year gave the same to trustees upon certain trusts, and died in 1840. After his death the rock and lighthouse dues were purchased by the corporation of the Trinity House, under the powers of their act (6 & 7 Will. 4. c. 79), and the compensation for the whole was assessed at 444,981*l.* 12*s.* 2*d.* The Trinity House, after making certain deductions in respect of sums charged upon the premises, paid 255,656*l.* 7*s.* 6*d.* into the Bank of England in respect of the two-thirds belonging to the testator.

This was an information by the Attorney General against the parties entitled to the money, insisting that the subject-matter in respect of which the compensation was paid, namely, the lighthouse dues, formed part of the personal estate of the testator, and was liable to probate and legacy duty.

The Solicitor General and Mr. Maule, in support of the information.—A subject cannot erect a lighthouse without the

licence of the Crown, for the King has a prerogative in lighthouses, and he may erect them in the soil of a subject without the subject's consent—*Bac. Abr.* tit. 'Prerogative,' (B,) 6, 3 *Inst.* 204, 4 *Inst.* 148. A suit for the profits of the beaconage of a rock in the sea may be in the Court of Admiralty, though the rock be the freehold and inheritance of another; for the profits of beaconage belong to the Admiralty—*Crosse v. Diggs* (1). The right to duties in respect of a lighthouse are therefore independent of the right to the soil on which the lighthouse is erected; and this distinguishes them from tolls payable to the lord of a manor in respect of a ferry or market within the manor; for the right to such tolls are incident to the manor—*Gibbs v. Osbaston* (2). Lighthouse dues are not liable to be rated for the relief of the poor as not being in the nature of real estate; and the officer collecting such dues is the servant of the Crown, and receives such fees by virtue of his office, and not in respect of the land—2 *Bott's Poor Law*, pp. 114, 115, 3rd edit., *The King v. the Inhabitants of Tynemouth* (3), *The King v. Coke* (4). These authorities are in favour of the liability to legacy duty; and the only authority to the contrary is the case of *Ex parte Ellison* (5), which was a decision upon the construction of the 6 & 7 Will. 4. c. 79. A grant of such tolls to a man and his heirs will merely create a fee simple personal—1 *Inst.* fol. 2, *The Earl of Stafford v. Buckley* (6). These dues would be assets for the payment of debts, and therefore liable both to probate and legacy duty.

The following decisions on the Mortmain Acts were also cited—

Negus v. Coulter, 1 Amb. 367.
Howse v. Chapman, 4 Ves. 542.
Knapp v. Williams, Ibid. 430, n.
Thompson v. Thompson, 1 Coll. 381;
 s. c. 13 Law J. Rep. (n.s.) Chanc.
 455.

- (1) 1 Sid. 158.
- (2) 2 Keb. 144.
- (3) 12 East, 46.
- (4) 5 B. & C. 797; s. c. 5 Law J. Rep. M.C. 8.
- (5) 2 You. & C. 528; s. c. 7 Law J. Rep. (n.s.)
 Ex. Eq. 49.
- (6) 2 Ves. sen. 170.

Sparling v. Parker, 9 Beav. 450; s. c.
 16 Law J. Rep. (n.s.) Chanc. 57.
Hilton v. Giraud, 9 Beav. 459, n.;
 s. c. 16 Law J. Rep. (n.s.) Chanc.
 285.

Mr. Watson, Mr. Wood, and Mr. Pitman, for the defendant.—Neither probate nor legacy duty is payable on the sum in court, for the tolls are payable in respect of the franchise, an incorporeal hereditament savouring of the realty. It is further a franchise to be exercised in a particular place. In *The King v. Coke*, Mr. Justice Holroyd put the matter in a true light; for the privilege granted is not an office, but a franchise—*Co. Litt.* 20 a, 2 *Black. Com.* C, 3, *Buckeridge v. Ingram* (7). The case of a market or fair is strictly analogous to the present: for the franchise may be held by one person, and the land on which the fair is held may belong to another; and in the case of a grant of a fair to be held on land of Borough English tenure, the franchise will pass to the heir at common law, and the land to the heir in Borough English—*Heddey v. Welhouse* (8), *Curwen v. Salkeld* (9), *Dixon v. Robinson* (10), *The Mayor of Northampton v. Ward* (11). Further, these tolls will pass by fine—5 *Cruise's Digest*, 133. With respect to the statute 43 Eliz. c. 2, poor-rates are to be levied on lands occupied within the parish, and tolls *per se* are held not to be rateable, the defendants not residing within the parish—*The King v. Rebou* (12), *The King v. the Inhabitants of Tynemouth*. But the fund is partly composed of the value of the land and partly of the franchise of the tolls. How are the respective values to be distinguished? *Radburn v. Jervis* (13), *Aubin v. Daly* (14), and *The Earl of Stafford v. Buckley* are all cases of personal estate though made descendible to the heir-at-law—*Williams on Executors*, 522. If the property passes to the heirs, the Ordinary would have no jurisdiction. If the tolls

- (7) 2 Ves. jun. 652.
- (8) Moore, 474.
- (9) 3 East, 638.
- (10) 3 Mod. 108.
- (11) 1 Wils. 107.
- (12) Cited in Cowp. 583.
- (13) 3 Beav. 461.
- (14) 4 B. & Ald. 59.

are not liable to legacy duty, then, *à fortiori*, they will not be liable to probate duty. The 55 Geo. 3. c. 184. is in the nature of a penal statute, and must be construed strictly in favour of the subject.

The Solicitor General replied.

Dec. 15.—The LORD CHANCELLOR.—The point which the Court is called upon to decide in this case is, whether the profits arising from the tolls received under a grant of a light-house are to be considered as personal estate or as real estate. The question whether they are liable to legacy duty depends on whether the property is to be considered in its character or nature as realty or as personalty. There is no great doubt or difficulty as to the principle: the question is as to the application of it to the particular facts of the present case; because there are so many instances in which extraordinary profits incident to the enjoyment of lands are considered as part of the land, and therefore realty, that the question depends altogether upon the connexion which these profits bear to the land itself. If the matter be an addition or accretion to the profit of the land, no doubt it goes with the land. If, on the other hand, as is contended for on the part of the Crown, it is a mere personal licence,—a personal franchise and liberty granted by the Crown to the individual, though necessarily requiring some connexion with the land, in order to produce the light for which the toll is payable,—then it is said that it must be considered as a mere personal benefit, and, of course, as such it would be personalty, although the estate in that personalty be limited to heirs; it would be a fee simple personal as Lord Coke describes it. When I come to observe on the language of some of the Judges in the cases which have been referred to, it is most important to bear in mind the provisions of the grant, and of the act of parliament. The present title is under an act of parliament, and that act refers to a previous grant; and therefore the relationship between these profits, and the lighthouse itself depends, in a great degree, on that grant. And it appears that, in former times, an individual, having a term in an island on the coast, obtained a grant of a lighthouse to be erected upon

that island; and the grant, which is recited in the act, states that the party at that time entitled to the term in the rock or island called Skerries “was willing, at his own expense and charge, to erect and build, and to support and maintain, a lighthouse or beacon thereon, as aforesaid.” Then it proceeds to grant to the party so entitled to this rock or island “all that the free liberty, licence, power and authority of erecting, supporting and maintaining a lighthouse or lighthouses, beacon or beacons, with lights to be continually burning therein in the night season upon the said island or rock,” for the term of sixty years. It then provides, that in case Trench (who was the party to whom it was granted) “shall not, within the space of five years next ensuing after the date of these our letters patent, erect and build, or cause to be erected and built, the said lighthouse or lighthouses, or shall at any time afterwards during the said term suffer the same to run to ruin and decay, or shall not keep and maintain a light or lights continually burning therein in the night season for the benefit of shipping, according to the true intent and meaning of these presents, then and in such case this our present grant shall be void and of no effect.” This is the grant. The act of parliament was passed before the expiration of the term of sixty years already mentioned, but provides for what should take place after the expiration of that term. It recites the grant, and that W. Trench, pursuant to the power given him, did actually erect and build a lighthouse on the rock or island, and that the lighthouse had been and was of constant use and benefit. It then recites that W. Trench had charged the property in the lighthouse with certain debts; then, after stating the title, the recital is in effect as follows, *viz.* that Sutton Morgan was then in possession of the said lighthouse; that the expense of maintaining the same had amounted to much more than the duties annually collected; that W. Trench, during his lifetime, supported and maintained the lighthouse almost to the utter ruin of himself and family; that Morgan had, since he had possession thereof, maintained and supported the same as far as in him lay, and had borrowed sums of money over

and above the money arising by the duties granted by the letters patent, but was no longer able to support the same; and the lighthouse (though of very great use and benefit to the public) must inevitably fall to ruin and decay unless the duties were extended; that the equitable right to the letters patent and to the lighthouse was vested, as aforesaid, in Morgan, his heirs and assigns; that it was judged absolutely necessary that the lighthouse should be preserved and kept up from and after the term of sixty years; and in consideration of the great expense Trench was at in building the same, it was thought just and reasonable that Morgan, his heirs and assigns, should for ever have the keeping up and supporting of the lighthouse, which could not be otherwise effected but by the aid of parliament. Then, in order to enable Morgan, his heirs and assigns, to maintain and keep the lighthouse in sufficient repair, and the lights therein continually burning in the night season, and also to pay the debts charged upon it, it enacts, "that all and every the powers, liberties, privileges, authorities, and duties granted in and by the said letters patent, and the said lighthouse, and all other rights, members, and appurtenances therewith occupied and enjoyed, shall be and are hereby declared to be firm, valid, and effectual to all intents and purposes whatsoever, and the same are and shall be valid and have continuance from and after the expiration of the said term of sixty years (thereby granted to the said William Trench, his executors, administrators and assigns), for ever; subject nevertheless, to the proviso as to the maintaining of the said lighthouse in the letters patent contained, and to the trusts herein-after mentioned, and shall be fully and absolutely vested in the said Sutton Morgan, his heirs and assigns." By a subsequent clause, Sutton Morgan, his heirs and assigns, from and after the 24th of June 1730, are authorized to receive the tolls upon the ships passing the lighthouse. Then there are other provisions regulating the amount of tolls; and then comes the following provision: "And it is hereby further enacted and declared, that the said lighthouse is hereby vested in the said Sutton Morgan, his heirs and assigns, to the intent and

purpose that he, the said Sutton Morgan, his heirs and assigns, shall, from time to time, keep and maintain the said lighthouse in good and sufficient repair, and shall in the night season maintain a proper fire therein, so as the trade and navigation in that channel may be effectually preserved." The result therefore is, that with those additional provisions, the act adopts all the provisions in the letters patent, and continues them, after the expiration of the sixty years, for ever in the grantee and his heirs: not the franchise—the privilege only,—but the lighthouse itself, with the right and duty of keeping a light burning therein.

The question then is, the house itself being clearly real property (and about that there is no contest), whether the privilege of receiving tolls, on condition of keeping up the light, is an incident or addition to the income or profit arising from the house; or whether it is a totally distinct and independent personal franchise, which in that case would be personalty, and not realty. First of all, if that be personalty, although it be limited to heirs, it may still continue personalty. We must look to the authorities which draw the distinction where the two interests of realty and personalty seem rather to merge one into the other. For instance, a personal annuity granted to a man and his heirs, where the heir of realty is the party to whom the limitation is made, seems to look towards realty. It is however considered not as realty, but as personalty. But the reason assigned, when that question has arisen in former times, is, that it has nothing to do with land; it is made inheritable as land is inheritable; but it has nothing to do with land; and if it has anything to do with land, the reason assigned why it is considered as personalty and not realty, fails. If it has, in this particular case in question, nothing to do with land, or as Lord Thurlow expresses it in *Lady Holderness v. Lord Carmarthen* (15), "does not savour of lands," then it is mere personalty.

Such is the nature of the grant, for it is a grant in terms. Although the title is not derived from the Crown to the island itself, yet the act of parliament vests the island in the individual with the duty of erecting

a lighthouse there, and keeping the light burning; and the privilege, in consideration of the benefit derived to navigation from such a light being kept burning, is that of receiving certain tolls from vessels that pass by. Now, in this case, the title to the profit depends upon the title and user of the house. The title and user of the house confer the right to the profits. This is a very common thing. All extraordinary profits incident to and dependent upon a title and user of land are part of it: such, for instance, as a soke-mill. In that case there is land: the mill is real property, it is so by custom. The only distinction will be found to be between custom in one case and a royal grant in the other. By custom this piece of landed property has certain duties imposed on it; that is to say, the owner of a soke-mill is bound to keep it in a proper state to grind the corn of those who are within the sphere of the custom; but in consideration of the performance of that duty, it has the privilege of monopoly, and of preventing others from interfering with that right; and therefore it has a duty imposed by custom, which of course originates in some contract. But the result is, that in law it has a duty imposed on it for the benefit of the public, with respect to which the public are subject to certain liabilities, in order to remunerate the parties by whom that duty is performed. The mill itself is probably of very little value, compared with the value that attaches to it by reason of the existence of this custom in its favour; because it then has the benefit of the right to receive all the profits that arise from grinding corn within the limits to which that custom applies.

The same observation will apply to many other privileges and franchises, which, though they touch the land, and are connected with it, yet the connexion is very slight, and they are only real property because they require the use of land for their enjoyment. As regards fairs and markets; no doubt, generally speaking, markets are connected with manors, but not necessarily or inseparably so. The right to the franchise may exist without it. A party has a right of market within certain limits; and so little connected is that right with the actual enjoyment of a

particular spot of land, that, within the limits of the franchise, the party may move his market. Whether he can get leave from the proprietor of the soil is quite a distinct matter. There is the privilege which he derives from the Crown; within the limits which the Crown has prescribed to him he may hold that market when and where he can. There is no doubt a market cannot be enjoyed, the public cannot have the benefit of it, and the owners cannot have the profits of it, unless with the use and occupation of certain land; but that is the only connexion that the right of market has with the land. The passage from *Coke Littleton*, 20 a, which was referred to in the course of the argument, draws the distinction and gives some instances, and it appears that the slightest possible connexion with land is sufficient to invest the franchise with the benefit and character of realty. He assigns that as a reason why peerages are descendible, and are considered as real property merely from the circumstance of a place being named, though the party to whom the dignity is granted has no connexion whatever with, and no profit or interest in the land itself. This might appear to be very plain, and to leave no doubt whatever that this ought to be considered as an incident to the land, and, therefore, partaking of the character of the land; and I can see nothing to raise a doubt. But certain cases have been cited in which this matter has been discussed and commented on by very learned Judges. I mean those cases in which the question has arisen whether property of this description is rateable. But, so far as I have been able to understand those cases, the question has been, not whether the subject-matter was rateable at all, but whether it was rateable within the parish in which it originated, in which the building was situate from whence the light was to proceed.

The last case that has been referred to, in which the matter appears to have been most elaborately considered, is that of *The King v. Coke*; but it is to be observed that there the decision ultimately turned upon the question whether the parish in which the lighthouse stood was the parish entitled to the benefit of the rate upon the profits incident to the enjoyment of the

rents of the lighthouse, namely, tolls taken from vessels not coming within the precincts of the parish. Undoubtedly, that is what the Judges decided, and that also has been the subject determined in the other cases. Now that being the point on which they so decided, if that had been put forward as the only ground, it would have superseded all other considerations, and it was quite unnecessary to consider what might be the effect of the profits being rateable or not, provided they might have been enjoyed within the limits of the parish. As they had decided that they were not subject to the rate, because the tolls had not been received within the parish, then the question whether they were realty or whether they were personalty, whatever might be their character in some other parish, would not be a matter at all calling for the decision of the Court. I have looked through the judgment very carefully, because, no doubt, the learned Judges who gave their opinion were Judges peculiarly entitled to have great weight attributed to what fell from them, and not likely to let fall opinions lightly formed, though not immediately amounting to a judicial decision. Those Judges were, Mr. Justice Bayley, Mr. Justice Holroyd, and Mr. Justice Littledale. In examining Mr. Justice Bayley's opinion, of course, I must do so without any reference to the matter before him as to the locality. There may be some difficulty whilst reading the report of the case in reconciling what he assumes to be facts with what the facts are reported to be; but for the present purpose, namely, of ascertaining what Mr. Justice Bayley's view was on the subject which I have now to decide, I must look to the terms which he uses; and the question whether or not he has accurately borne in mind how far the facts of the case fall in with the proposition which he states would not at all affect the weight of the expressions he there uses. Now he, throughout, seems to assume, in that particular case with which he has to deal, that the right and privilege to the franchise was totally distinct from the right to the house; and there are many expressions, some of which I shall have to refer to, in which not only is that shewn to be his view, but he seems to assume that if it were otherwise,

if the enjoyment of the privilege were directly connected with, and proceeding from the occupation of the premises, then the rule would be different. If that be so, although his decision was one way, the doctrine on which he proceeded would appear to be very clearly the other; for in one passage, after alluding generally to the benefit arising from the use of real property, he describes it as the value which the land had acquired from being so used. He then distinguishes that general proposition from the particular case which he had before him. He then instances the case of the New River Company; and that raises a question, certainly, of very great nicety, in which, I think, it was held, that the profits arising from supplying water by means of the New River Company were rateable, but rateable in the place where it originally proceeded from, the place where it was created. It is a nice distinction to say, that if I send water from a particular place, so as to acquire value at a distant place, the value so paid at that distant place is rateable, because it is real property; but if I send light instead of water, or fire instead of water, it is to be subject to a different rule. What is a lighthouse? It is merely sending a stream of light to a distance, where it is of use, and where parties pay for it, because they derive benefit from it. If I send water, it is said to be real property; if I send light, it is not, according to the argument, real property. But Mr. Justice Bayley distinguishes it in this way: he says, the New River Company case does not apply, "because the proprietor of the lighthouse in this case"—(this shews the ground on which he proceeds, which is all I am in search of)—"is at liberty either in that house, or in any other which he may think fit to erect or to rent, to burn lamps, and to produce a stream of light which shall be visible at a considerable distance at sea. But even if, by the terms of the letters patent, it were imperative on the grantee to burn his lights within this particular lighthouse, still, if the privilege is not given to him by reason of his being the occupier of that house, it would not be appurtenant to, but distinct from, the house where it was to be exercised; and the duties payable to him in respect of the

light would be profits arising from the exercise of that privilege, and not from the house or land where it happens to be exercised. The grantee would, in that case, have an exclusive privilege of carrying on in that particular house (if I may so express myself) a particular description of trade. But there would be no necessary connexion between the freehold interest in that house and the light which is to be kept up in it." The lights are not of necessity attached to the freehold, and if they are not attached to the freehold, it is personal property. No doubt that puts the case very fairly; but how far the facts of that case justified the distinction which Mr. Justice Bayley took, it is not my business to inquire. But he puts the proposition as Mr. Wood would put it; if the light is unconnected with the building, if it is not necessarily connected, if the party may create the light as he pleases, without reference to the building, why then it is personalty. If the light be not attached to the freehold, it is personalty; but if it be attached to the freehold, as in the case of the New River Company, then, as Mr. Justice Bayley says, it partakes of the character of that landed property from which it originates, therefore it is real estate.

There is another case which shews how nice these distinctions are. In *The King v. the Brighton Gas Light and Coke Company* (16) it was held that the profits from the gas-works for the supply of gas were rateable, because the pipes pass through the land; they were laid in the land, and being so laid they were rateable; and it was held they were rateable where the gas was delivered and used. There again is a nice distinction. According to the modern mode of use (what it was originally I do not know), the light is produced by gas. If I send a stream of inflammable gas through a pipe, and ignite it at the end, it is real property. If I send a stream of light from the house where it originates, according to the argument used in the present case, it is personalty. It is difficult to draw the distinction between the very same article producing the same effect, whether that effect is produced in

one place or another, except that it may be very important when you come to the question of rating, because the limits of the locality of a parish are all important. But when you come to consider whether it partakes of the character of realty or personalty, it seems to me to be very immaterial whether the effect is produced by igniting the gas in one place or igniting it in another.

There are many examples put in the argument of the case, 5 B. & C. 801, to which I have referred, but there is one which comes particularly near to the present, and which is very difficult to distinguish from it; that is the case of a canteen, which applies to every public house requiring a licence to sell spirituous liquors. The house, no doubt, is of a certain value in itself, but it is well known that a house prepared and built for the purpose of a public house would be comparatively of small value if it had not the licence of selling spirituous liquors; and that licence once obtained (I do not know whether the licence is transferable or not, but I suppose it is granted for that particular house), is a profit not connected with the house at all. It is in a sense connected with the house as soon as it is granted to the party occupying the house, but it is not in its nature connected with the house. It is a privilege derived under certain acts of parliament, which prohibit all persons from selling spirituous liquors unless they are licensed so to do; but it has nothing to do with the house in its nature. It is a privilege, not a royal privilege, because it emanates from act of parliament, but it is a privilege conferred by the licensing Magistrates to a party to use that particular licence, for the purpose of selling liquors in that particular house. These two things are distinct in their nature; one is a mere personal licence, to be exercised, no doubt, with reference to a building, but, at the same time, the two things are distinct in their nature. Nobody can doubt that when a house has derived an additional value from a licence being so obtained, the whole realty consists of the value of the house, increased by the particular benefit arising from the use to which it is to be applied, not on account of anything connected with the house originally, but by virtue of that

(16) 5 B. & C. 466; s. c. 4 Law J. Rep. K.B. 213.

licence which has been granted by a totally distinct authority and has proceeded from a totally distinct channel.

In that case to which I have already referred, Mr. Justice Littledale says, p. 812, "Tolls, *per se*, are not rateable. But in some cases where they arise from and are so far connected with a house or land, that the land or house which gives occasion to the toll is made more valuable in itself, that increased value, depending upon and being regulated by the profits produced by the toll, is the subject of rate." So that, looking through the opinions of those learned Judges, it appears to me to be clear (whether they were right or wrong is immaterial) that they considered the question to depend on this, viz. whether the additional value attaching to the enjoyment of the privilege was or was not attached to and connected with the building,—the real property,—which real property they said was not at all connected with the privilege in the case they were considering.

In the present case it is immaterial whether those learned Judges were right or wrong in that supposition; but when I look to this act of parliament, I find that the privilege is granted in consideration of erecting the house originally; and then the act recites, that the party had performed his condition by erecting the house, and that he had incurred great loss, and had been put to great expense in building the house, which the tolls (as they understood) were not sufficient to repay; and when I find that if he did not maintain the house (not some house, but the particular house which he had so built), not merely for a certain time, according to original grant, but *in perpetuum*, he was to forfeit the privilege which the letters patent in the first instance, and the act afterwards, conferred upon him, and the privilege, therefore, was connected with the mode in which he dealt with the house, that he should not perform the duty anywhere else but in that house; and then that the tolls are limited in the same way, and in the very same words in which the title to the house is enjoyed, it seems to be impossible to say that the profits arising from this benefit were not attached to, or, in the words used by Mr. Justice Bayley

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and Mr. Justice Littledale, in the case to which I have referred, were not "connected with" the house. Indeed, the case referred to in *Coke Littleton*, 20, a, proves that a slighter connexion with land than that which is found in this act of parliament gives to grants from the Crown the character of realty. It has hardly ever been doubted, I think, except in those cases which have been the subject of argument, that such a privilege attached to property as that which attaches to this lighthouse gives an additional and extraordinary profit, arising from the mode in which the property is employed; the licence or authority to use it as a lighthouse being derived either from royal authority, as in cases of letters patent, or the authority of an act of parliament, as a privilege and benefit connected and arising from (in fact) the enjoyment and user of the house. Without the house the privilege cannot be enjoyed at all. The title is to be commensurate with the enjoyment of the house, and to terminate if the duties were not performed which he has undertaken to perform.

It appears to me, therefore, according to the opinions of the learned Judges who decided that case of *The King v. Coke*, which is the only authority for the claim of legacy duty on this property, that the lighthouse in question has the toll so attached to it and dependent upon it that the whole must be considered as real property; and, therefore, not subject to legacy duty. That, of course, will decide the other question, as to the liability of the lighthouse to probate duty, which has circumstances connected with it which, even if I had held a different opinion touching the liability of the lighthouse to legacy duty, would have prevented its being subject to the probate duty. My opinion, therefore, that the lighthouse is not liable to legacy duty, necessarily carries with it the question as to probate duty.

K. BRUCE, V.C. }
Feb. 9. } DINNING v. HENDERSON.

Administration of Estate—Income Tax—Interest on a Debt due on a dishonoured Bill of Exchange.

In the course of the administration of the

estate of a testator, a debt, in respect of a dishonoured bill of exchange, and nine years' interest on it, were found to be due from his estate to a creditor. It appeared that it was the practice in the Masters' offices to deduct income tax in respect of the interest, and the Court refused to disturb such practice.

A bill of exchange as follows—"Glasgow, 6th March 1839. Six months after date pay to me or my order, at my counting house here, 1,000*l.* per value received,"—was, on the 6th of March 1839, drawn on Mr. Taylor, and accepted by him. Before the bill became due Mr. Taylor died, and the bill was dishonoured. The bill came into the hands of the Royal Bank of Scotland.

The present suit was instituted for the administration of the estate of Mr. Taylor.

The Master, in his report of debts, made under the usual decree, found that there was due to the cashier of the Royal Bank of Scotland interest on the above-mentioned 1,000*l.* at the rate of 5*l.* per cent. per annum, from the 19th of September 1839 to the 28th of July 1848, amounting to 433*l.* 15*s.* 6*d.*, less income tax.

A petition was now presented, on the part of the Royal Bank of Scotland, that the Master might review his report, on the ground that income tax ought not to have been deducted in the Master's office, and that the Master ought to have found that the whole of the interest was due to the bank.

The 5 & 6 Vict. c. 35. s. 102. provides that, upon all annuities, yearly interest of money, or other annual payments, whether such payments shall be payable as a personal debt or obligation by virtue of any contract, or whether the same shall be received and payable half-yearly, or at any shorter or more distant periods, there shall be charged for every 20*s.* the sum of 7*d.*; and the person liable to make such annual payment shall be authorized to deduct such sum.

Mr. Lewin, for the petition, contended that the Master had no authority under the 5 & 6 Vict. c. 35. to stop the income tax, and that the whole interest ought to have been paid to the banking company, and that the banking company were the proper parties to pay it. He cited—

Holroyd v. Wyatt, 1 De G. & Sm. 125; s. c. 16 Law J. Rep. (N.S.) Chanc. 174; and
Dawson v. Dawson, 11 Jur. 984.

Mr. Toller, for the executors, said that it was the settled practice in all the Masters' offices to make a deduction for income tax in such cases.

Mr. Lewin replied.

[In the course of the argument his Honour said he had sent notes to Master Dowdeswell and Master Farrer, to inquire as to the practice in their offices, and that he had received replies that in such a case income tax would be deducted.]

Knight Bruce, V.C. (after stating the bill of exchange).—Before the bill became due Mr. Taylor died, and the bill, when due, was dishonoured. A decree has been made for the administration of Mr. Taylor's assets. Interest has been claimed by the holder of this bill of exchange as a creditor on this estate. In such a state of circumstances I should have thought that, according to the true construction of the Income Tax Act, the interest would have been allowed to have been paid to the claimant in full, and the claimant himself left to pay the income tax. This act has been in operation seven years and more, and I have the view of three Masters, Sir George Rose (from whose report this is an appeal), Mr. Dowdeswell, and Mr. Farrer, who say that the course in their offices has been, and is, to deduct the income-tax of 7*d.* in the pound from interest on bills of exchange and promissory notes; and there seems reason to believe, from the statements of counsel on both sides, that it is the custom of the other Masters. In this state of things, I think that it would be too much for me to disturb so uniform a practice. Therefore, without reference to my own opinion, I decline to disturb this course of practice.

V.C. }
Feb. 13. } DEEKS v. WALKER.

Supplemental Bill—Demurrer—Supplemental Matter.

A bill was filed by shareholders in a company against the directors for an account.

One of the directors having become bankrupt, a supplemental bill was filed against the defendant, alleging that the plaintiffs had discovered, since the filing of the original bill, that the said director, before his bankruptcy, had paid or secured to the defendant the amount for which he was liable to the company:—Held, upon demurrer, that as the case for relief existed prior to the filing of the original bill, and as the plaintiff would have been entitled to that relief, if entitled at all, prior to the bankruptcy, the mode of obtaining it was not by a supplemental bill. Demurrer allowed.

This case came on upon demurrer to a supplemental bill filed by George Deeks and others, shareholders in a company instituted and formed in the year 1837 for the purpose of carrying on the business of bankers, under the style and firm of the Borough of Marylebone Bank, against W. Bell, E. Charleton, W. Quilter, J. Lowe, and E. Walker. The original bill was filed, in December 1842, against the Hon. Leicester Stanhope and fifteen other defendants, directors and shareholders of the Marylebone Bank. The said bill alleged various acts of mismanagement against the directors in respect of the officers of the company, and charged that the said directors were personally liable to account for and to make good to the said company all the deposit and calls on the several shares in the said company allotted by them to the several defendants to the said bill or to any or either of them. It was stated by the bill that in August 1841, the business of the company was suspended and the accounts with the customers were either closed or transferred to the London and Westminster Bank, and the effects of the company had been disposed of; but the defendants Donald M'Lean, Robert Lowe, Edmund Walker, and David Hannay, as such directors, as well as some other of the defendants, were still acting in the management of the affairs of the company, in getting in the outstanding debts. The said bill prayed that an account might be taken of all sums received by the directors and of all sums properly expended by them, and that the directors might be declared personally liable to make good what might be found

due to, and the losses sustained by, the company, and that what should be found due from the defendants might be ordered to be paid and applied for the benefit of the shareholders. The supplemental bill, after setting forth the original bill, stated that several of the defendants had demurred to the said bill, and their demurrers had been overruled(1); that an appeal was afterwards presented by the defendants against this decision, which appeal still remained undetermined. That a fiat in bankruptcy, dated the 30th of June 1846, had been duly issued against the said Donald M'Lean, under which he was declared a bankrupt, and the defendants, William Bell, Edward Charleton, and William Quilter, had been appointed assignees of his estate. That the plaintiffs had discovered, since the filing of their original bill, that the said D. M'Lean, before his bankruptcy, in the course of some transactions with the said defendant, Edmund Walker, paid or secured to the said defendant, Edmund Walker, the amount which ought to have been paid to the said company by the said Donald M'Lean for the deposit and calls upon two hundred shares and upwards in the said company which had been taken by or allotted to or carried to the credit of the said Donald M'Lean improperly and without the payment of any deposit or calls as aforesaid, and that the said Donald M'Lean was induced so to do upon the representation that in the opinion of Sir W. W. Follett, upon a case submitted to him, such payment ought to be made or security given to the said defendant, Edmund Walker. That the case so laid before Sir W. W. Follett, upon which the said opinion was founded, was not a true statement of facts. That the plaintiffs had discovered, since the bankruptcy of the said Donald M'Lean, that there were accounts between the said defendants Edmund Walker and D. M'Lean, and which, if produced and investigated, would shew that the said E. Walker treated and dealt with D. M'Lean as the absolute owner of divers of the shares in the said company which had been improperly placed in his name or carried to his credit, and had received from the said D. M'Lean money, or securities for money,

(1) 13 Law J. Rep. (N.S.) Chanc. 453.

in respect of the deposit and calls payable on such shares. The bill, therefore, prayed that the plaintiffs might have the full benefit of the original suit and proceedings against the defendants, Bell, Charleton and Quilter, as they might have had against the said D. M'Lean in case he had not become a bankrupt, and that the said E. Walker might be treated as answerable for the payment of the deposit and calls due in respect of the aforesaid shares, and upon which the said D. M'Lean ought to have paid, but did not pay to the said company the deposit and calls due to the company in respect thereof.

To this supplemental bill a demurrer was put in by Edmund Walker, on the ground that such bill did not contain any matter to entitle the plaintiffs to relief or discovery against him.

Mr. Stuart and *Mr. Cole* appeared for the demurrer, and contended that the transactions with respect to Mr. Walker having taken place before Mr. M'Lean's bankruptcy, they might have been introduced when the original bill was filed, or they might have been stated by way of amendment, but they could not constitute matter for a supplemental bill.

Mr. Bethell and *Mr. Glasse* appeared in support of the bill.

The VICE CHANCELLOR.—The relief which is asked on the supplemental bill against Walker is, that he may be treated as answerable for the payment of deposit and calls due respectively on the shares on which a claim is made, but the obligation of M'Lean to pay was an obligation which necessarily preceded his bankruptcy; and if relief is sought of anything preceding the bankruptcy, it appears to me that it is a relief to which the plaintiffs in the original bill would have been entitled, if entitled at all, prior to the bankruptcy. Therefore, the fact that the bankruptcy happened subsequently to the filing of the original bill does not shew of necessity that the plaintiffs became entitled to relief by means of the supplemental bill filed after the bankruptcy took place. As I understand the matter, it is stated that there was a case for relief which existed prior to the filing of the original bill, and consequently the mode of getting at it is

not confined to the supplemental bill. The demurrer must therefore be allowed, with costs.

V.C. }
Feb. 15. } CULLUM v. UPTON.

Infant Tenant in tail in remainder —
1 Will. 4. c. 60.

A testator having contracted to grant a building lease, died before he had executed the lease, and by his will gave his property to four successive tenants for life and to each of their first and other sons in tail male in succession. All the tenants for life were alive, but the fourth was the only one who had a son, who was an infant. The Court directed the infant tenant in tail in remainder to join in executing the lease which the testator had contracted to grant, under the 17th section of 1 Will. 4. c. 60.

The bill stated that in the year 1842 the Hon. Fulke Greville Howard was the owner in fee simple of a freehold estate at Kilburn; that in the year 1843, Mr. Robert Cantwell, a surveyor, and the lawfully authorized agent employed by the said Fulke Greville Howard, entered into two agreements with the plaintiff to let to him two pieces of land forming part of the said Kilburn estate, at a specified rent, for a term of ninety-nine years from Michaelmas 1843, for the purpose of the plaintiff's erecting thereon five houses, according to a certain plan, and that the said agreements were reduced into writing, and signed by the said Robert Cantwell and the plaintiff; that on the faith of the said agreements the plaintiff caused to be built the said five houses, and having in all things performed his part of the said agreements, the plaintiff applied to the solicitor of the said F. G. Howard for leases of the said houses, and the drafts of such leases were thereupon prepared and engrossed for execution, and only awaited the signature of the said F. G. Howard, but that he died on the 4th of March 1846, without having executed such leases; that the said F. G. Howard, by his will, dated the 2nd of June 1842, gave and devised the said Kilburn estate, by the description of all the messuages, lands, tenements, and hereditaments situate

at Kilburn, to which he was then or might thereafter be entitled, or over which he then had or might thereafter have any disposing power, to the use of his nephew, the Hon. Arthur Upton, and his assigns, during his life, without impeachment of waste, and after the determination of that estate by any means during his life, to the use of trustees, to preserve contingent remainders, with remainder to the use of the first and other sons of the said Arthur Upton, successively in tail male, and for default of such issue, to the use of the testator's nephew, George Frederick Upton, in like manner, for life, with remainder to his first and other sons in tail male, and for default of such issue to the use of Capt. Charles Bagot, for life, with remainder to his first and other sons, in tail male, and for default of such issue to the use of Capt. Henry Bagot, for life, with remainder to his first and other sons, in tail male, with divers remainders over as therein expressed, and with the reversion to the testator's own right heirs for ever; that the testator left the several devisees him surviving; that the plaintiff, during the life of the said F. G. Howard, duly paid to him all rents which from time to time became due under and by virtue of the said agreements; that after the decease of the said testator, the said Arthur Upton entered into the possession or receipt of the rents and profits of the said Kilburn estate, and the plaintiff had since that time duly paid the said Arthur Upton all rents which had become due under the said agreements; that the said Arthur Upton and George Frederick Upton were respectively unmarried, and that the said Charles Bagot married in the year 1846, but had no issue, and that the said Henry Bagot was married and had had issue one son named Arthur Greville Bagot, an infant, who was the first tenant in tail now in existence entitled under the limitations aforesaid, but whose estate might be defeated by the birth of male issue to the said Arthur Upton, G. F. Upton, and Charles Bagot, or any of them; that the plaintiff was advised that in construction of equity the said F. G. Howard, the testator, was, in his lifetime, and at the time of his death, a trustee for the plaintiff of the ground and premises in the said agreements mentioned, so far as might be neces-

sary for giving full and legal effect to the leases therein stipulated and agreed to be granted to the plaintiff, and that the several persons in the will named as devisees in succession took their respective estates and interests under the said will charged with and subject to such constructive trust as aforesaid, and were in like manner trustees for the plaintiff by construction of equity for the purposes aforesaid; that the plaintiff had applied to and requested the defendants to join and concur in executing to the plaintiff leases of the said premises in conformity with the two leases whereof drafts had been prepared, but the defendants respectively alleged that there were doubts and legal difficulties, and amongst others the infancy of the said Arthur Greville Bagot, which prevented their compliance with the plaintiff's request, and that they were unwilling to act in the premises without the direction and decree of this Court. The bill therefore prayed that the said agreements might be specifically performed and carried into execution under the decree of the Court, and that it might be declared that the several defendants, according to their respective estates and interests under the will of the said F. G. Howard, were, by virtue of the said agreements, and by the construction of equity, trustees of the legal estate of and in the said hereditaments and premises for the plaintiff, for the purpose of executing to the plaintiff leases of the same premises, in conformity with the drafts of leases so settled and engrossed as therein mentioned, during the lifetime of the said F. G. Howard; and that the defendants might be decreed to execute or join in executing proper leases to the plaintiff of the said premises in conformity with the said drafts, and that all necessary directions might be given for that purpose.

Mr. Bethell, Mr. Campbell, and Mr. Jervis appeared for the different parties, and submitted the question raised by the bill to the judgment of the Court, whether the infant tenant in tail in remainder, whose interest was liable to be defeated by the birth of a prior tenant in tail, could be directed under the statute 1 Will. 4. c. 60. to join in the execution of the lease to the plaintiff.

The 17th section of the act was referred to (1).

The VICE CHANCELLOR.—It appears to me that the case now submitted is clearly pointed out by the statute to which I have been referred. It appears by my notes that, in July 1846, I made a very similar order. It was the case of an infant who had the legal estate, subject to a charge. A decree was made directing a sale to raise 300*l.*, and I held under the 6th and 18th sections that there should be an order for an immediate conveyance by the infant. The vendor in the present case is dead, and has devised his property in such a manner as that what was contracted for in his lifetime can be carried into effect by his devisees; and, therefore, my opinion is, that what is required by the lessee flows from the very words of the 17th section.

K. BRUCE, V.C. }
Feb. 19. } FYLER v. NEWCOMB.

Evidence—Interest—Party to the Suit.

A plaintiff filed a bill, on behalf of himself and all other the shareholders of a company, except the defendants, against the defendants, alleging certain improper dealings by them with the funds of the company, and praying relief:—Held, that it was not competent for the plaintiff to examine a shareholder, not a defendant, in support of the case made by the bill.

(1) 1 Will. 4. c. 60. s. 17. "And be it further enacted, that where any land shall have been contracted to be sold and the vendor or any of the vendors shall have departed this life, having devised the same in settlement so as to be vested in any person for life or other limited interest, with any remainder, limitation or gift over which may not be vested, or may be vested in some person from whom a conveyance of the same cannot be obtained, or by way of executory devise, and a specific performance of such contract, either wholly or so far as the same remained to be executed, shall have been decreed by the Court of Chancery, it shall be lawful for the Court by whom such decree shall be made by the same or any other decree or any decretal order, or upon petition in the cause, to direct any such tenant for life, or other person having a limited interest, or the first executory devisee thereof, to convey the fee simple or other the whole estate contracted to be sold to the purchaser, or in such manner as the said Court shall think proper."

The bill in this case was filed by George Fyler, on behalf of himself and all other the shareholders of the Shropshire Mineral Railway Company, except such of the shareholders as were defendants, and against whom relief was prayed. The bill was filed against the secretary, the under-secretary, the brokers of the company, certain persons who had been placed on the finance committee of the company, and eleven persons who had been directors of the company; and prayed for an account of the defalcations arising from certain alleged improper dealings with the funds of the company by the defendants, and consequent relief.

The cause now came on to be heard.

The plaintiff had examined some gentlemen who, as appeared from the statements of the bill, were shareholders at the time that the bill was filed, but of whose position, in that respect, nothing further appeared.

Mr. Russell and *Mr. Wickens*, for the plaintiff, proposed to read the evidence of one of these gentlemen.

Mr. James Parker, Mr. Malins, Mr. R. Palmer, Mr. Swanston, Mr. Selwyn, Mr. Webb, Mr. C. Roupell, Mr. Ellis, Mr. C. T. Simpson and *Mr. Giffard*, appeared for the defendants, and objected to the evidence being read. It has been established that a defendant cannot be examined as a witness by another defendant in the same interest—*Monday v. Guyer* (1). Such a case is an exception to the 6 & 7 Vict. c. 85. Here it is proposed to examine a person who, though not actually a plaintiff, is in the same situation as a plaintiff, and in the same interest with him. The point is decided by *Monday v. Guyer*.

Mr. Russell contended that, under the words of the act, the witness was competent—*Wood v. Rowcliffe* (2). But, admitting that a person who was a shareholder at the time of the examination was not a competent witness, it did not follow that this witness was to be excluded. He was certainly, as appeared by the bill, a shareholder at the time that the bill was filed; but did it follow that he was such at the time of the examination? He might have

(1) 1 De Gex & Smale, 182; s. c. 16 Law J. Rep. (N.S.) Chanc. 246.

(2) 6 Hare, 183.

parted with his shares between the time of the filing of the bill and the examination, and his interest, therefore, might not have continued.

KNIGHT BRUCE, V.C. said that the witness was substantially, though not in form, a plaintiff; and that a plaintiff, in his opinion, could not be examined on behalf of another plaintiff in the same interest. With reference to the question of a continuing interest, he thought that it must be presumed that the state of things, alleged in the bill to be existing at the date of the bill, continued; and that it lay in the party whose interest was against such presumption to shew the contrary. He said he must therefore, with much regret, reject the evidence.

K. BRUCE, V.C. }
March 13. } WILSON v. WILSON.

Will—Construction—Bequest of a Business—Option of taking a Legacy instead of an Annuity.

A testator, who was a publican carrying on business at a leasehold house in G. Street, bequeathed this house to A, with the business, stock and outstanding debts, conditionally, upon his purchasing a certain annuity:—Held, that A, in accepting the bequest, was not to be held to pay the debts due from the testator in his business.

*A testator made certain bequests to A. and B, conditionally on their purchasing an annuity for S. W. for her life, and another annuity for S. H. for her life, or 500*l.* in money:—Held, that S. H. had not the option of taking the 500*l.**

Charles Wilson made his will dated the 26th of December 1837, in the following words:—"To my brother, H. H. Wilson, I leave all and every part of my lands and buildings at Peldon, in the county of Essex, conditionally that he grants to Charles Fiffin a lease of twenty-one years at 200*l.* per year; and further, that he joins my nephew in purchasing the annuities hereinafter mentioned. To my nephew F. Wilson, I leave my leasehold house in Gracechurch Street, with the business, stock, and outstanding debts; and also

my freehold house at Stratford Green, conditionally that he joins my brother in the purchase of the following annuities, namely, 100*l.* a-year to my wife S. A. Wilson, so long as she live, and, if she has any child born, such sum to be continued for its life, such child to be the produce of our marriage. To my old and faithful Sarah Hanley 25*l.* per year during her life, or 500*l.* in money. To M. Bardsley the sum of 100*l.* as a legacy. My plate and books I leave for my wife, with liberty to take as much furniture and linen as she may think proper, my nephew F. Wilson having the remainder. The cash in the house at the time of my decease and my watches and trinkets are also for my wife. These arrangements to be made as soon as possible after payment of my debts and funeral expenses."

The testator had carried on business as a publican at the house in Gracechurch Street mentioned in his will. The suit was instituted for the administration of the testator's estate.

At the hearing of the cause, before Knight Bruce, V.C., in March 1847, two questions arose upon the will: first, whether the testator's nephew F. Wilson, the legatee of the testator's stock, business and outstanding debts, was liable to pay the debts due from the testator in his business; and secondly, whether the annuitant, Sarah Hanley, had the option of taking 500*l.* instead of the annuity. It was decided that the nephew was not bound to pay the debts due from the testator, and that Sarah Hanley was not entitled to the option. The case is reported as to the annuity in 1 *De Gex & Sm.* 152.

The cause came on for further directions, and both the above points were again raised and discussed.

Mr. Russell, Mr. Glasse, Mr. Hargrave, and Mr. Surrage, for different parties.

KNIGHT BRUCE, V.C. said that he would reconsider both points. At present he remained of the same opinion as when the cause was last heard. Unless he mentioned the case in the course of a week he must be taken to be of the same mind.

The case was not mentioned again.

K. BRUCE, V.C. }
March 18. } ECCLES v. BIRKETT.

Will—Construction—Vesting—Gift of Income of Legacy.

*A testator directed his trustees, out of his estate, to pay to each of his children, as and when they should attain twenty-five years, the sum of 3,000*l.*; and declared that it should be lawful for the trustees to apply all or any part of the income of each share of his said children for their maintenance and benefit, until he or she should attain twenty-five; and also to apply any part not exceeding 200*l.* for his or her advancement:—Held, that the legacies vested absolutely in the children at the testator's death.*

Thomas Eccles, by his will, dated the 17th of November 1839, devised all his real and personal estate to trustees, upon the usual trusts for conversion into money, and directed them, out of the monies thus arising, to pay the annuity of 150*l.* therein mentioned. The will then proceeded as follows:—"And subject to the said annuity of 150*l.*, upon trust, to pay to each of my children who shall be living at the time of my decease, or born in due time afterwards, except my said sons Adam and Henry, as and when they shall respectively attain the age of twenty-five years, the sum of 3,000*l.* absolutely; and I declare and direct that it shall be lawful for my said trustees to apply all or any part of the income of each respective share of my said children under my said will for his or her maintenance or education, or otherwise for his or her benefit, until he or she shall attain his or her age of twenty-five years, as aforesaid. And I further direct and declare, that it shall be lawful for my said trustees or trustee, for the time being, to apply any part of the share of each such child, not exceeding the sum of 200*l.*, in or towards his or her advancement or preferment in the world, or otherwise for his or her benefit, as my said trustees or trustee shall think proper."

This was a suit for the administration of the estate of Thomas Eccles.

Some of the children of Thomas Eccles having died under the age of twenty-five years, a question arose, whether the legacies given to the children had vested in

them at once under the will, or were contingent on their attaining their age of twenty-five years.

Mr. Malins and *Mr. Daniel*, for the representatives of the deceased children.—Under the will the legacies vested at once in the children at the death of the testator. We admit that, under the first clause—"to pay to each as and when they attain the age of twenty-five years,"—if it had stopped there, the legacies would have been contingent. The will, however, goes on to give the children the income of the legacies, and the effect of the gift of the income added to the terms of the previous gift of the principal, is to give the children a vested interest—

Hanson v. Graham, 6 Ves. 239.

In re Bartholomew's Trust, 1 Hall & Twells, 565; s. c. 1 Mac. & G. 354; ante, p. 237.

Mr. Cooper and *Mr. J. T. Humphry*, for the residuary legatees.—The legacies did not vest in the children at the death of the testator. The principle established by *Hanson v. Graham* may be admitted. There is, however, a marked difference between this case and that of *Hanson v. Graham*. In *Hanson v. Graham* the whole of the income was given for the children. Here, however, there is a gift only of such part of what would be the produce of the legacy as the trustees should think fit. Suppose the trustees should give only a part of the income, the residue would form a part of the general estate of the testator. In *Hanson v. Graham* there was one gift only, the capital being severed from the general estate at the death. Here, there are two gifts, a gift of some interest until the child attains twenty-five, and a gift of 3,000*l.* on his attaining twenty-five, and this sum was not intended to be severed from the general estate until that time. They cited—

Leake v. Robinson, 2 Mer. 363, and

Taylor v. Bacon, 8 Sim. 100.

Knight Bruce, V.C. said that he thought that, under the particular language of this will, the legacies had vested in the children at the death of the testator.

V.C. { THE MAYOR AND CORPORATION
March 1. { OF BERWICK-UPON-TWEED v.
MURRAY.

Account—Bill for an Account—Fiduciary Office—Liability of Sureties—Parties—Evidence—Cross-Examination of Witnesses.

A bill was filed by the corporation of Berwick against the treasurer of the borough fund and three persons who were his sureties, for the purpose of obtaining an account of monies which had been paid to the treasurer. The defence of the treasurer was, that he had been proceeded against before the Magistrates under a clause in the Corporation Act, and the plaintiffs' claims could not now be enforced by a court of equity. The defence of two of the sureties was, that the corporation by their act were only empowered to appoint a treasurer from year to year, and as he had been continued beyond the first year, without a renewal of the bond of the sureties, they were no longer liable. The defence of the third surety was, that he had given notice that he would no longer continue surety, and that, although no deed had been executed by the corporation to exonerate him. It was also contended, that the sureties were not necessary parties to the suit. The Court held, that the treasurer having taken upon himself a fiduciary trust, it was the duty of a court of equity to enforce the due performance of it; that, as the bond to which the sureties were parties contained a clause extending their liability to any annual or other future election of the treasurer, that liability still remained; and that no deed having been actually executed to exonerate the third surety he was also liable.

It was further held, that the sureties were necessary parties to the suit.

The plaintiff having examined witnesses on particular points, the defendant is at liberty to cross-examine those witnesses upon any other point he thinks fit.

This bill was filed by the mayor, aldermen and burgesses of the borough of Berwick-upon-Tweed against David Murray, the late treasurer of the borough fund, and obligor in a certain bond, entered into by him at the time of becoming such treasurer,

and William Murray, John Campbell Renton and James Jeffreys Oswald, the sureties in the said bond.

The bill stated that the above corporation existed long anterior to the Municipal Corporation Act, 5 & 6 Will. 4. c. 76; that by the said act it was provided (*inter alia*) (s. 58.) "that the council of every borough should every year appoint a fit person, not being a member of the council, to be the treasurer of the borough; and such other officers as they should think necessary, and should take such security for the due execution of his office by any such treasurer or other officer as the said council should think proper, with such salary as they should consider reasonable; and in case of a vacancy in his office, by death, resignation, removal, or otherwise, the council might appoint another fit person in his place. (s. 60.) And that every town clerk, treasurer, or other officer appointed by the council as aforesaid should, at such times during the continuance of his office, or within three months after its expiration, and in such manner as the council should direct, deliver to the council or to such person as they should authorize, a true account in writing of all matters committed to his charge, and of all monies received, paid and disbursed by him, with vouchers, and a list of defaulting parties, with the amount due from each; and that every such officer should pay all such monies as should remain due from him, to the treasurer for the time being, or to such person as the council should authorize, and in case of refusal or wilful neglect to deliver such account, vouchers, or list, or to make such payment, or refusal or neglect to deliver, within three days after notice in writing of not less than three of the council, all books, papers and writings relating to the execution of the said act, then and in every such case, upon complaint made by the said council to a Justice of the Peace for the county or district, such Justice was empowered to issue his warrant to bring such officer before any two Justices, who should, upon appearance or non-appearance, determine the matter in a summary way, and might cause a distress to be levied upon the goods of such officer for the monies due, and in case of insufficiency of goods, or refusal and wilful

neglect to pay, and deliver lists, &c., they should commit him to gaol, without bail, for insufficient distress, for any time not exceeding three calendar months. And it was provided that nothing in the said act contained should prevent or abridge any remedy by action against any officer so offending, or against any surety for such officer; but that such officer should not be sued by action, and also proceeded against in a summary way.

The bill then stated that by a subsequent act so much of the aforesaid act as related to the annual appointment of treasurer was repealed, and it was enacted that the council of every borough should appoint a treasurer during their pleasure.

That on the 9th of June 1840 David Murray was appointed land steward and superintendent of works; and on the 27th of December 1841 he was appointed treasurer of the corporation, until the 9th of November then next, if they should so long please, with a salary of 60*l.* per annum. That a bond, dated the 15th of January 1842, was executed by David Murray, as principal, and the other defendants, and one Johnston, who had since died in Scotland, without having any personal representatives in this country, as his sureties; whereby they bound themselves in the sum of 2,000*l.*, jointly and severally, to pay to the town council, burgesses, &c. all such sums as David Murray should receive as treasurer of the borough, during the whole time of his continuing in the said office, in consequence of the said election, or under any annual or other future election of the said council to the said office. That on the 9th of November 1842, and on the same day in the year 1843, David Murray was successively elected treasurer of the borough during the pleasure of the council, and the usual deed-poll and power of attorney was thereupon executed; that the said David Murray continued to hold such office until a quarterly meeting held on the 7th of February 1848, when it was ordered that he should cease to be treasurer and land steward from the 24th of June then next; and notice was given him of such order; and on the 10th of May 1848, Charles Richmond Burnett was chosen treasurer, and upon that occasion another deed-poll

was executed, whereby David Murray was required to deliver an account of his treasurership, under the act, to the new treasurer, and he was served with a copy of the said deed; that David Murray, at a meeting held on the 20th of June, delivered an account, whereby it appeared that the balance in his hands belonging to the corporation was 4,289*l.*, and orders were made for payment of 709*l.* 1*s.* 6*d.*, leaving a balance of 3,580*l.* 9*s.* 6*d.* in his hands.

The bill then stated that David Murray refused to retire from the treasurership, and did not, as he ought to have done, deliver his account, or pay over the balance in his hands to the new treasurer, insisting upon the invalidity and irregularity of the proceedings. The plaintiffs then took counsel's opinion, and held another meeting, at which a resolution was passed, that David Murray should be forthwith removed; and at a further meeting, the election of C. R. Burnett was again made, to secure the formality of the proceedings. The bill then stated that David Murray met C. R. Burnett in pursuance of notice, but he neither delivered his accounts nor paid over the balance, referring Burnett to his books at his own office, whither Burnett proceeded, and upon inspection no balance was found to be struck, neither was any payment made, but David Murray positively refused to deliver up the books. At the next quarterly meeting, held in August, David Murray was ordered within three days to deliver the accounts to Burnett, but David Murray again refused to do so. It was then resolved that David Murray should be summoned before two Justices, before whom he attended, not being in actual custody, and who, upon hearing the case, dismissed the complaint, on the ground that the 60th section of the Municipal Reform Act was highly penal in its character and consequences, and moreover, doubtfully and ambiguously worded. Another meeting was then held, and, under the advice of counsel, a fresh demand and notice were served on David Murray, who was also personally required to account and pay, and threatened with a bill in equity in case of refusal; but he merely handed a letter to the town clerk, characterizing the proceedings as illegal, and stating that the books were at his office for inspection.

The bill then stated that notice was sent by letter to the sureties of D. Murray of the intention of the corporation to file their bill, and charged that upwards of 2,800*l.* was due from D. Murray. The bill prayed an account against D. Murray as treasurer, and that the balance due from him when ascertained might be ordered to be paid by him to the present treasurer, with the costs of the suit; and that, to the extent of 2,000*l.*, the three sureties might be declared jointly and severally liable to make good what should be found due from D. Murray, with the costs of the suit; and, to the extent of 2,000*l.*, ordered to pay to the present treasurer, or such person as the Court should direct, what, upon taking such accounts, should be found due, and for the delivery of all books and papers by D. Murray connected with his office of treasurer, and for an injunction to restrain his interference in the corporation affairs.

D. Murray put in his answer, calling in question his own dismissal and the appointment of C. R. Burnett as treasurer, but admitting a balance of 3,323*l.* 4*s.* 4*d.* of the corporation monies in his hands, and stating that he did not cease to act as treasurer until the 29th of July 1848. The answer then submitted, that upon inspection of the books the balance might have been easily struck, and denied a refusal to produce the books, declared ignorance of the proceedings of the meetings, and submitted that he must be considered as having been actually in custody before the Justices, and that therefore the suit could not be instituted against him. The answer then admitted that since July 1848, Burnett had acted as treasurer, and had been impeded by his detention of the books, but that he, Murray, was of right treasurer of the borough, but could not act by reason of the impediments thrown in his way by the plaintiffs and Burnett. This defendant submitted, that neither he nor the three other defendants as his sureties were liable upon the bond after the 9th of November 1843, and that the latter were improperly made parties.

The sureties, W. Murray and J. C. Renton, also put in their joint answer, making a similar case with D. Murray as to the bond and annual appointment, and charging a secret understanding between D. Murray

and the corporation, that, in consideration of the smallness of his salary, he should be allowed to retain large balances, and that they became sureties on the footing of such balances being paid into a banker's to the plaintiffs' account, which was departed from without their knowledge. It was then submitted that the bond was void, or, at all events, a question for a court of law.

The defendant Oswald, by his separate answer, stated his formal renunciation of the suretyship, on the 13th of September 1847, whereby he submitted that he had got rid of all liability, and likewise he submitted that the bond became void as regarded him.

On the 17th of November last a motion was made that D. Murray should produce documents, which was ordered, and on the 8th of February an order was made, upon motion, that the defendant, Murray, should forthwith pay into court the sum of 3,323*l.* 4*s.* 4*d.*, being the amount remaining due from him, according to what appeared upon the books of the corporation.

The cause now came on for hearing.

Mr. Bethell and *Mr. Craig* appeared for the plaintiffs, and contended that the Court of Chancery had power to compel payment of the money due from the treasurer, notwithstanding the proceedings already taken before the Justices. That nothing could oust the jurisdiction of this Court, except an express provision to that effect—

Mayor of Lichfield v. Simpson, 8 Q.B. Rep. 65; s. c. 15 Law J. Rep. (n.s.) Q.B. 78.

Augero v. Keen, 1 Mee. & W. 390; s. c. 5 Law J. Rep. (n.s.) Exch. 233.

Mr. J. Parker and *Mr. Shapter* appeared for the principal defendant, Murray, but it was objected that he could not be heard, since he was now in contempt for not having obeyed the order of the Court requiring him to pay the balance alleged to be due from him. Upon this point the following cases were cited—

King v. Bryant, 3 Myl. & Cr. 191; s. c. 6 Law J. Rep. (n.s.) Chanc. 151.

Herring v. Clobery, 12 Sim. 410; s. c. 11 Law J. Rep. (n.s.) Chanc. 410.

Ricketts v. Mornington, 7 Sim. 200.

Wilson v. Bates, 3 Myl. & Cr. 197;
s. c. 7 Law J. Rep. (N.S.) Chanc. 131.

The VICE CHANCELLOR said, he remained of the opinion he had expressed in *Herring v. Cloberry*, and he thought it was just that the defendant should be heard in order that he might have an opportunity of clearing his contempt.

It was then contended that by the Municipal Corporation Act, it was expressly provided that, if an officer of the corporation should be proceeded against in the summary manner pointed out by the act, he could not be made answerable by means of any other jurisdiction. Mr. Murray was actually summoned before the Magistrates, and the charge was dismissed. The following cases were cited upon this point:

Marshall v. Pitman, 9 Bing. 599; s. c. 2 Law J. Rep. (N.S.) M.C. 33.

Heming v. Swinnerton, 2 Ph. 79; s. c. 16 Law J. Rep. (N.S.) Chanc. 90.

Mr. Rolt and *Mr. Lewin*, for the first two sureties in the bond, submitted, that as the act of parliament, directing the corporation to appoint a treasurer, only enabled them to elect such officer for one year, the bond must be considered as extending only to that period, and the sureties could not be called upon to make good any claims upon the treasurer for money received after the first year, when a re-appointment was in fact made, which necessarily constituted a new election and a different office.

Mr. Stuart and *Mr. Toller*, for the last defendant, contended, in addition to the arguments used for the first two sureties, that he was exonerated in consequence of his having given notice to the corporation that he would no longer be liable upon the bond. The notice was formally given to the corporation, and a deed was prepared for the purpose of his being removed from the suretyship; but, although such deed was never actually executed, it was contended that the notice this defendant had given was sufficient to release him from the liability. Upon this subject the following cases were cited:—

Gordon v. Calvert, 4 Russ. 581.

Clarke v. Henty, 3 You. & C. 187.

The King v. Dickenson, 1 Saund. 135, b.

The VICE CHANCELLOR, before hearing the reply said, he did not wish to hear arguments as to whether the bill could be sustained against David Murray, the treasurer, because it appeared to him that Murray, at all events, became liable. He had placed himself in a fiduciary character and was therefore liable to account for what he had received, and though the statute had pointed out a summary method of proceeding for the recovery of monies in his hands, yet it did not take away what was established by the law of England, that persons standing in a fiduciary character should be liable to account to this Court; and, notwithstanding what took place before the Justices, D. Murray stood in such a character as of necessity rendered him liable to account.

Mr. Bethell, in reply, contended, that where it was necessary to sue the principal obligor in a bond, it was requisite to have the sureties before the Court. Where the principal was amenable to the Court, the sureties were equally so, and the rules of equity required that they should be also sued; because, when the accounts were taken it might be found that there were not sufficient assets on the part of the principal, and then the sureties would have to contribute, in which case they would have to be brought before the Court by a supplemental bill, to compel them to make good whatever the principal was unable to pay. The arguments raised for the defendants were, that the plaintiffs had no power to take a bond for more than one year's account, and that no further account could be taken against the sureties. Now, though the act contemplated an annual appointment of treasurer, the legislature could never have supposed that there would be a new treasurer every year, and if the former treasurer was competent to be elected again, there was nothing to prevent the corporation from taking a security which would last over the year. Neither was there anything to prevent the sureties from giving a security, which would extend to the period to which the appoint-

ment extended. The statute provided that the corporation should be at liberty to take such security as they should think fit. It was, therefore, left to their discretion to what extent the security was to go. It had been contended, that as they could not elect a treasurer for more than a year, they could not extend the security beyond that period; but this was answered by saying, that as there was nothing in the act to prevent the corporation from continuing the old treasurer from year to year, they could do the same with regard to the bond, and make the security extend to the term at which the office should expire. It had also been urged, that the new appointment constituted a new office, and that the liability would expire with the expiration of the old office. The language of the bond was sufficiently express upon this point, since the contract was, that the sureties should be liable during the whole time that D. Murray should continue in the said office, in consequence of the said election, or under any annual or other future election of the said council to the said office. The authorities cited were all cases in which it was held that a bond given for discharging the duties of an annual office would not be extended beyond the year, without an express provision to that effect; but here there was an express provision to that effect. It was also contended, that the suretyship was undertaken upon the condition and subject to the express terms of an order made by the corporation, that the money received by the treasurer should be paid into the county bank; but the facts were, that the corporation had allowed the money received by the treasurer to be placed in the bank with an understanding that the interest given by the bank upon the deposits should go towards payment of the salary of the treasurer, but this order was afterwards annulled, and the treasurer was paid a specific salary. There was nothing illegal in this order, nor was it such a change in the dealings of the council with the treasurer as in any manner to exonerate the sureties.

The last point raised was, that the third surety was exonerated by reason of his having given notice of his intention to retire from the suretyship, but this was clearly contrary to the law, and no case

had been cited in support of such a doctrine: on the contrary, a surety could not exonerate himself by any other means than by a deed being executed to effect that express object.

The VICE CHANCELLOR.—The first question I have disposed of, because it appeared to me to be quite absurd to say that a party who had taken upon himself the office of treasurer, had not also taken on himself that species of fiduciary trust which it is the duty of a court of equity to enforce; that was sufficient, I thought, to enable me to make a decree against him. Then, as to the point raised that it is not necessary to have the sureties before the Court, I believe it is the constant practice of the Court in making a decree against the principal obligor to have all the sureties parties to the cause, and you cannot prosecute the suit against the principal, so as to have an effectual decree, without having all the sureties before the Court; for if the principal should become insolvent, it would be necessary to file a new bill to have the original sureties made liable. There were two points which struck me as being important in the arguments for the defence; one was the objection which was raised as to the case in *Saunders*, with a view to make the legal deduction from that case applicable to this; but it appears to me on looking at the terms of the bond, that it is so framed as to steer clear of all those questions, because the words of the bond are, that the parties bound themselves jointly and severally to pay to the town council, burgesses, &c. all such sums as D. Murray should receive as treasurer of the borough during the whole time of his continuing in the said office, in consequence of the said election, or under any annual or other future election of the said council to the said office: then at once the analogy between the cases is at an end. I was also struck with what appeared to me at first to be something like a fraud, and I certainly did not perceive the state of the case so clearly at once as to say to myself that there had not been some fraud, but it really is the simplest case in the world. No doubt in law the corporation was entitled to make use of the old security until they had parted with it. If they had actually parted with it, and taken a new security,

that would in equity have put an end to the old security, but no such new security ever was taken. It appears there were instructions given for a new bond to be prepared, but it does not appear to me that there is any evidence to shew that the corporation did waive the right which they had by reason of the original bond. My opinion is, that nothing has been proved to shew that the corporation can be considered to have accepted the new bond in lieu of the old. At first I had an impression raised in my mind against the fairness of the proceeding, but I do not think there is any objection on that ground, and I really am unaware on what ground I can refuse the decree asked. The decree must, therefore, be against all the defendants.

Then, as to costs, my notion is this, that if the plaintiffs bring forward a case in which they do succeed at the hearing, that *prima facie* is a reason for giving the costs up to the hearing, though it may happen that subsequently the defendants may be relieved. A case of this nature occurred a short time ago, where a bill was filed for an account against executors, and costs were given to the plaintiff up to the hearing. Then it turned out that the executors' accounts were right, and the order for costs was reversed.

During the hearing of this case, the following question as to admissibility of evidence arose.

The plaintiffs having examined witnesses as to particular circumstances, the counsel for the plaintiffs contended that the defendant was not at liberty to read the cross-examination of those witnesses on any other points than those to which the plaintiffs' examination in chief extended. For the defendant, it was argued, that the practice now pursued in the courts of equity was assimilated to that of the courts of law, and it was established that when one party should examine a witness on any points whatever, the opposite party might cross-examine that witness upon any other point he should think fit.

The VICE CHANCELLOR decided that, according to the practice now adopted in

courts of equity, the defendant might cross-examine the plaintiffs' witnesses on any points he pleased.

K. BRUCE, V.C. }
March 14. } WILD v. GLADSTONE.

Practice—Plea—Illegitimacy—Oath.

Bequest to the children of A. as a class. B. claiming to be a child of A, filed a bill for the administration of the testator's estate. A plea stating the illegitimacy of the plaintiff required to be put in upon oath.

A testator bequeathed a share of residue to the children of Mr. Wild as a class. The plaintiff, claiming to be a child of Mr. Wild, filed a bill against the representative of the testator for the administration of his estate.

The defendant put in a plea that the plaintiff was illegitimate. The plea was not put in upon oath.

Mr. Russell and *Mr. Glasse*, for the plea, contended that it did not require the oath of the defendant, and read the following passage from *Lord Redesdale on Pleading*, p. 301, 4th edit.: "And pleas in bar of matters *in pais* must be upon oath of the defendant; but pleas to the jurisdiction of the Court, or *in disability of the person of the plaintiff* (with other pleas therein mentioned), need not be upon oath."

Mr. J. A. Cooke, for the bill.

KNIGHT BRUCE, V.C. said, that he had no doubt that the plea ought to have been put in upon oath. The only doubt which he had was, whether the plea should be overruled or ordered to be taken off the file. He might, however, give leave that a notice should be given that the plea should be taken off the file. This might be avoided if the defendant would consent that the case should be treated as if there was such a motion.

Mr. Russell, on behalf of the defendant, consented that it should be so treated.

L.C.
1849. } *In re* THE SHREWSBURY GRAM-
Nov. 10. } MAR SCHOOL.

Charity—Sir S. Romilly's Act—Jurisdiction.

Where an act of parliament has provided for the application of the surplus funds of a charity, but the mode of application thereby pointed out has become inexpedient or useless, the Court has jurisdiction upon the petition of the trustees under Sir S. Romilly's Act, to direct an inquiry before the Master as to the expediency of applying for another act of parliament to authorize an application of the surplus in a different mode.

This petition was presented under Sir S. Romilly's Act (52 Geo. 3. c. 101.) by the governors and trustees of the Shrewsbury Grammar School. The petition stated the foundation of the school by King Edward the Sixth, and certain endowments for its support by Queen Elizabeth, and certain ordinances for its regulation; and also an act of the 38 Geo. 3. c. lxxviii. for the better government and regulation of the school. The endowment consisted in part of certain rectorial tithes in Shrewsbury and the neighbourhood. By the 8th section of that act it was provided, that all the property of the school should be vested in the governors and trustees of the school and their successors, except the right of presentation to certain livings therein named. By the 24th section, it was enacted, that the surplus revenues of the school, after satisfying the purposes therein before mentioned, should be employed in founding exhibitions in either of the universities of Oxford or Cambridge, for scholars answering the description therein contained; or for the increase of the stipends of the vicar and curates of certain livings belonging to the school, as the governors and trustees and the Bishop of Lichfield (the visitor) should see fit.

The petition stated that the present income of the school exceeded 3,000*l.* per annum; and that large accumulations had arisen from the yearly surplus income which amounted to from 400*l.* to 600*l.* in every year; and that it was not considered advisable to increase the exhibitions, as

they were already more than equivalent to the number of scholars qualified to receive them.

The petition prayed that a proper scheme might be settled under the direction of the Court; and that the petitioners might be at liberty to propose a scheme having for its object, among other things, the teaching of modern languages, an alteration of the time for which the exhibitions might be held, and in the qualifications of the boys eligible for exhibitions, and the increase of the stipends of the vicars and curates before mentioned; and for the sanction of the Court in applying for an act of parliament as to such matters in the administration of the charity funds as required the authority of the legislature to alter.

The petition was heard before the Vice Chancellor of England, who was of opinion that the Court had no authority, upon a petition under Sir Samuel Romilly's Act, to make the order prayed, as the petition sought not to carry into effect the existing regulations of the 38 Geo. 3, but to vary them; and this object was a proper subject for an information.

The petition was now brought forward by way of appeal before the Lord Chancellor.

The Solicitor General and *Mr. Kenyon*, for the petitioners.

Mr. Stuart, for the Bishop of Lichfield, and—

Mr. Rolt and *Mr. Wray*, for the corporation of Shrewsbury, supported the prayer of the petition.

Mr. Wood and *Mr. Wickens*, for the head master of the school, and—

Mr. Bacon and *Mr. Glasse*, for St. John's College, Cambridge, contra, contended, that where the act of parliament was so precise in its terms as to the application of the surplus fund, the governors and trustees could not come by petition under Sir S. Romilly's Act for a scheme to apply those funds to quite a different purpose.

[*THE LORD CHANCELLOR.*—The trustees allege that there is a surplus which they cannot properly apply under the provisions of the 38 Geo. 3. That, if proved, is sufficient to give the Court jurisdiction.]

That the case was one for the discretion of the Court, which the Court would not

exercise upon petition — *The Attorney General v. the Earl of Devon* (1).

The Solicitor General replied upon the merits.

THE LORD CHANCELLOR.—I am quite satisfied that the Court has jurisdiction, and that the words of the act (52 Geo. 3. c. 101.) are equivalent to this, namely, that whenever it occurs that the assistance of the Court is required in the administration of charity estates, there a jurisdiction is given by the act. The question comes then to this, is or is not this a case in which the assistance of the Court is required by the trustees, in the administration of the charity funds? There are charity funds in the hands of the trustees which were not contemplated by the author of the gift, because there are accumulations which have arisen from the income being more than sufficient for the objects to which it was to be applied. The trustees say "We have funds which we admit to be charitable funds, and we do not know the precise mode in which they ought to be applied." If that were all, and there were no particular act of parliament directing the application of the trust funds, it would be the ordinary case in which, since the passing of Sir S. Romilly's very useful act, parties come to ask the direction of the Court as to the disposal of funds with respect to which there are either no specific directions as to the trust to be executed, or which, for some reason or other, cannot be properly and advantageously employed in the execution of the trusts pointed out. But it is said that the act of the 38 Geo. 3. interposes in the present case, and, in fact, points out the scale and rule which ought to be followed. Now, I have perused that act, and cannot find that it at all provides for the circumstances that have occurred, and which are brought forward by this petition, and which were not at all contemplated at the time that act passed. It is true that many of the things now asked might require parliamentary authority, but others, which have arisen in the administration of the trust, are not at all contemplated by the act of parliament, which, therefore, does not lay down any

(1) 15 Sim. 259; s. c. 16 Law J. Rep. (N.S.) Chanc. 34.

rule by which the discretion of the trustees is to be exercised. I have, therefore, no hesitation in coming to the conclusion that what is now asked properly brings the case within the meaning of Sir S. Romilly's act, and that this is a case in which the assistance of the Court is required in the administration of the trust funds. With regard to the act of parliament referred to in the prayer of the petition regarding such matters as it may require the authority of parliament to alter, it is of constant occurrence that the Court is asked to inquire whether an act of parliament shall be applied for. If the application is in respect of such matters as this Court has no jurisdiction to alter, or which are already provided for by act of parliament, it is obvious that an act of parliament is necessary to enable the trustees in such cases to depart from that which is their prescribed duty according to the existing rule, and it is the constant practice of this Court to inquire, in the first instance, whether it is for the interest or benefit of the charity that parliament should interfere. As far as the House of Lords is concerned, I know it never authorizes an interference with a charity fund without the previous sanction of the Court of Chancery. It has often happened that committees of the House of Lords have very properly suspended bills for this purpose, until the matter has been brought before the Court of Chancery, in order to know what direction the Court might think proper to make, the House of Lords not professing to exercise the jurisdiction of the Court of Chancery, but only to carry into effect that which the Court of Chancery thinks right to be done in furtherance of the objects of the charity. The question of jurisdiction appears to have been the only difficulty felt by the Vice Chancellor; considering this a proper case for the interposition of the Court, if it had jurisdiction. As I think that it is a proper case, and that the jurisdiction is clear, the order must be made as prayed.

The head master was allowed to attend before the Master, reserving all questions as to the costs of such attendance; and St. John's College and the corporation of Shrewsbury were to be at liberty to attend at their own expense.

M.R. }
Jan. 18. } GREGORY v. MARYCHURCH.

*Witnesses — Examination in Equity —
Leading Interrogatories.*

Interrogatories were exhibited for the examination of witnesses in a cause. Exceptions were taken to them on the ground that they were leading and suggested answers beneficial to the plaintiff, and not calculated to elicit the truth, and they were allowed by the Master:—Held, upon exceptions to the Master's certificate, that the interrogatories were not leading, and that objections might be taken to the evidence at the hearing of the cause.

This cause again (1) came before the Court upon exceptions to the Master's report, certifying that various interrogatories for the examination of witnesses were leading.

The sixth interrogatory was "Whether or no did David Davies, now deceased, and John Evans, as then carrying on the business of attornies and solicitors at, &c., open, in their joint names, a banking account with the western branch of the Commercial Bank in London, in, &c., on the 4th day of April 1846, or on or at any other and what day or time? If yea, how long was such joint account continued, and when was it finally closed? By whom, and how were the cheques, which were drawn in respect of the said joint account, signed? Did or not the said D. Davies and J. Evans also respectively keep separate accounts with the said bank as distinguished from their said joint account? Whether or not did the said J. Evans, on the 5th of July 1847, or on or at any other and what day or time, draw, on his said separate account with the said bank, a cheque for the sum of 14l. 11s. 6d. or for some other and what sum, inclusive of the said sum of 14l. 11s. 6d., in favour of the said joint account of himself and the said D. Davies, with the said bank? If yea, was or not such cheque returned to the said J. Evans, with notice, on the part of the said bank, that he had not, on his said separate account, sufficient effects to meet it? And was or not, on the following day, the 6th of July

1847, or on or at some other day or time, the said cheque or some other and what cheque drawn by the said J. Evans, on his said separate account, for the said sum of 14l. 11s. 6d., or for some other and what sum, inclusive of the said sum of 14l. 11s. 6d., honoured by the said bank, and was or not the said amount of 14l. 11s. 6d. paid or transferred accordingly from the said separate account of the said J. Evans to the said joint account of the said D. Davies and J. Evans with the said bank? Did or not the said J. Evans, on the 22nd of June 1847, or on or at any other and what day or time, pay or direct to be credited to the said separate account with the said bank, or deposit with the said bank three promissory notes for 50l., drawn and signed by Sarah Matters, in favour of the said complainant, and bearing date respectively the 9th day of June 1847, or some other and what date respectively, and payable respectively on the 24th of August 1847, the 24th of December 1847, and the 24th of April 1848, or on or at some other and what days or times respectively, or some other and what promissory notes or promissory note drawn and signed by the said Sarah Matters in favour of the said complainant? Did or did not the said J. Evans indorse the said three promissory notes, or some or one and which of them, to or in favour of the said Commercial Bank? Was or not one and which of the said promissory notes discounted for the said J. Evans by the said bank? Did or not the said bank retain the other two of the said notes, and why, and what is become thereof? Whether or no were any and what proceedings ever and when taken on the part of the said bank, to recover from the said complainant the amount of the said promissory note discounted as aforesaid for the said J. Evans by the said bank? If yea, what was recovered from the said complainant, or paid by him to the said bank in respect or on account of the said note, as you know, or for any and what reason believe? Declare, &c."

The seventh interrogatory was, "Whether or no were you ever and when employed or instructed by or on the part of the Commercial Bank of London, as their attorney or solicitor, to take any and what legal proceedings against the said complainant for the

(1) *Ante*, p. 77.

purpose of recovering or obtaining from him payment to the said bank of the amount of any and what promissory note or promissory notes drawn by Sarah Matters in favour of the said complainant, and indorsed by the said J. Evans to the said bank, or any other and what promissory notes or promissory note? If yea, did you or not take or commence any and what proceedings against the said complainant for the purpose aforesaid? And did you or not recover or receive payment from the said complainant of the amount of any such note or notes, or some and what part of such amount? And whether or not any, and what sum for the costs of the said proceedings? What was the total amount paid to you by the said complainant for principal, interest, and costs in respect of the said promissory note upon which he was so sued as aforesaid upon the part of the said bank, and in respect of the said proceedings against him? Have you or not the said notes, or one, and which of them, in your possession?"

A part of the eighth interrogatory was, "Whether or no did you inform or make known to the said D. Davies that the sum of 151*l.* 5*s.*, or other the money paid by the said Sarah Matters as aforesaid to the said J. Evans, had not been entered in the said partnership books? If yea, what notice did the said D. Davies take thereof? Was or not the said D. Davies, as you know, or for any and what reason believe, informed by any other person, and whom, of the said Sarah Matters having paid the said sum of 151*l.* 5*s.*, or any and what sum of money on the settlement of the said action, or since, and when, to the said J. Evans, on the part of, and as one of the members of the said firm of Davies & Evans, or otherwise, on behalf of the said complainant? *Whether or no did you ever, and when, suggest to the said D. Davies, or press or urge upon him that he should write and make inquiry of Thomas Wrigley and James Wrigley whether they had authorized the said J. Evans to retain as a loan the said sum of 151*l.* 5*s.*? When was the partnership between the said D. Davies and J. Evans dissolved? &c."*

The second of the further interrogatories was for the examination of Mrs. Matters, and after inquiring whether an action had not been brought against her at the suit of

the plaintiff and his wife, it asked, "Did or not the said D. Davies and J. Evans, or one and which of them, on the part of their firm of Davies & Evans, of, &c., act as the attornies or attorney of the said complainant and his wife, or of either and which of them, in the said action or proceedings, as you know, or for any and what reason believe, and by whom were you served with a writ in the said action? Who acted as your attorney or agent in the said action? *Was or not the said action or proceedings stayed or settled under or pursuant to an order made by the Chief Justice of the Court of Common Pleas, on the 9th of June 1847, or on some other and what day; and upon the terms of your giving to the said complainant three promissory notes for the sum of 50*l.* each, or some other and what promissory notes, and paying to the said complainant the sum of 150*l.* and interest, or some other and what sum and interest?* If yea, did you or not and when sign and give the said notes, or any and which of them, to the said complainant, or to any other person, and whom, for the said complainant, on his account or behalf, and did you or not and when pay the said sum of 150*l.* and interest, or any and what part or parts thereof, to the said complainant, or to the said D. Davies and J. Evans, or either and which of them, as the attornies or attorney of, and on the account and behalf of the said complainant, &c.?"

On the 1st of December 1849, upon the petition of the defendants, an order was made referring it to the Master to look into the interrogatories exhibited by the plaintiff, for the examination of witnesses, and he, on the 11th of December, found the interrogatories to be leading in the parts printed in Italics, upon which the plaintiff excepted to the Master's certificate.

Mr. Beales, for the plaintiff.—The Master decided that he must consider the examination upon the same principles as governed an examination at Nisi Prius; but in such cases counsel varied the question if it was thought leading, and obtained the answer desired; but in examinations of witnesses in courts of equity, no objection can be taken until the publication, when the deposition may be suppressed. The Master was pressed with the hardship and

inconvenience of applying the principles of courts of *Nisi Prius* to these courts, but he considered he was bound so to do. Examinations upon written interrogatories before an examiner cannot be considered upon the same footing. The Court will consider the justice of the case, and whether the interrogatories are intentionally leading or likely to bias a witness; that will entirely alter the case. One of the witnesses was the clerk of the banking company whose interest was opposed to the plaintiff. Upon the case of *Lincoln v. Wright* (2), these interrogatories are not leading; and when reasons for suppressing depositions are doubtful, the Court will preserve them, otherwise the Court will have nothing upon which to form an opinion—*Pearson v. Rowland* (3); but if these interrogatories are tested by the rules prevailing at *Nisi Prius*, the questions will not be found open to objection.

Mr. Shebbeare, for the defendant.—The interrogatory suggested to the witness the answer to be given: he had only to say yes or no, in order to answer it; at the same time the interrogatory left uncertain whether any notice of the return of the cheque was given or not; the question, therefore, is not calculated to elicit the whole truth, but only to obtain an answer in a particular form favourable to the plaintiff.

Mr. Beales, in reply.

The several other exceptions were then argued *seriatim*, with little variation.

THE MASTER OF THE ROLLS.—If any objection to the evidence exists, it may be taken at the hearing; I do not think the interrogatories are leading; the exceptions, therefore, must be allowed, and the deposit returned, but I shall not give any costs.

[See *Naish v. the East India Company*, 2 Fowl. Ex. Prac. 154; *Mentill v. Payne*, 3 Anst. 923; *Lord Arundel v. Pitt*, Amb. 585; and *Spence v. Allen*, Pre. Ch. 493.]

(2) 4 Beav. 166; s. c. 10 Law J. Rep. (N.S.) Chanc. 331.

(3) 2 Swanst. 266.

M.R. }
March 4, 5, 8. } SALOMONS v. LAING.

Railway Company — Individual Shareholder — Application of Capital — Notice, Liability of Parties receiving—Demurrer.

A railway company applied a portion of the capital of the company, raised under the powers given by their act of incorporation, in the purchase of shares in the Direct L. and P. Railway Company, which latter company had full notice of the purposes for which the monies were raised by the company advancing it. Upon a demurrer, for want of equity to a bill filed by an individual shareholder,—Held, that the two companies were guilty of fraud and collusion, and were parties to the same breach of trust, and that the Direct L. and P. Railway Company were properly made parties to the suit, they having made themselves principals in the transaction.

Held, also, that the plaintiff, as an individual member of the company applying the money, had not only a right to sue the company, of which he was a member, for an illegal act, but also the other company, and all persons receiving the benefit of that act, without having first made an attempt to get the concurrence of the whole corporation of which he was a member.

The plaintiff, after the allowance of the demurrer for multifariousness, *ante*, p. 225, amended his bill in pursuance of the leave given, and struck out all such parts as related to the purchase of that part of the line of the Direct London and Portsmouth Railway as laid between Epsom and Leatherhead, and, as amended, the bill prayed for a declaration that it was not within the powers of the London, Brighton and South Coast Railway Company, or of the directors thereof, to subscribe for or purchase on behalf, and out of the capital or funds of such company, any of the 4,000 shares, and 677 shares in the Direct London and Portsmouth Railway Company. And that it might be declared that the defendants Leo Schuster, Edward Crowley and George Frederick Hotham, ought to be taken and considered as having subscribed for and purchased the said shares on their own account, and not as trustees for the London, Brighton and South Coast Railway Company. And that it might be declared that

the Direct London and Portsmouth Railway Company had no valid claim in respect of such shares, or any of them, for any call or calls to be made thereon against the capital or funds of the London, Brighton and South Coast Railway Company. And that an account might be taken of the sums which the bill alleged to have been illegally paid, and that the defendants Leo Schuster, Edward Crowley, and George Frederick Hotham, and also the defendants W. A. Wilkinson, Samuel Laing, William Cash, Charles Sedgfield Crowley, John Lawrie, John Nix, and James Wishaw, might respectively be decreed to replace and repay to the funds of the London, Brighton and South Coast Railway Company, the sums which had already been paid, and any other sums which might be paid out of the capital or funds of such company for or in respect of the 4,000 shares and 677 shares in the Direct London and Portsmouth Railway Company respectively, or any of them, together with interest thereon, after the rate of 5l. per cent. per annum. And that the Direct London and Portsmouth Railway Company might also in like manner be decreed to repay and replace the said sums with interest thereon, after the rate aforesaid. And that all the defendants, S. Laing, L. Schuster, W. Cash, C. S. Crowley, E. Crowley, G. F. Hotham, J. Lawrie, J. Nix, and J. Wishaw, and the London, Brighton and South Coast Railway, might be respectively restrained by injunction from applying any of the capital or funds of the London, Brighton and South Coast Railway Company, in payment of any further calls or call on the 4,000 and 677 shares, or any of them respectively. And that the said defendants, S. Laing, L. Schuster, W. Cash, C. S. Crowley, E. Crowley, G. F. Hotham, J. Lawrie, J. Nix, J. Wishaw, W. A. Wilkinson, and the Direct London and Portsmouth Railway Company, might pay the costs of this suit.

To this amended bill the Direct London and Portsmouth Railway Company put in a demurrer for want of equity, on the ground, among others, that the plaintiff, as an individual member of the corporation of the London, Brighton and South Coast Railway Company, could not sue the Direct London and Portsmouth Railway Company

for wrongs alleged to have been done to the corporation.

Mr. Malins and *Mr. W. J. Bovill*, in support of the demurrer.—The bill alleged that money was improperly taken from the capital and funds of the London, Brighton and South Coast Railway Company. For this the company could sue the directors, and the corporation would be entitled to relief against acts of their officers amounting to a breach of trust. The members of the governing body are the agents of the corporation, and no individual member of the corporation could sue a third party, unless perhaps the company refused to act—*The Attorney General v. Wilson* (1). In this case the funds were taken from the capital of the London, Brighton and South Coast Railway Company by their governing body, and if it must be restored by them, the company can, if necessary, sue the Direct London and Portsmouth Railway Company, but an individual shareholder had no such right—*Foss v. Harbottle* (2), *Preston v. the Grand Collier Dock Company* (3), *Mozley v. Alston* (4), *Lord v. the Copper Miners' Company* (5), *Bagshaw v. the Eastern Union Railway Company* (6). The creditors of an estate also could not be allowed to sue the debtors to an estate—*Lancaster v. Evors* (7). If, therefore, any injury has been done to the plaintiff by the London, Brighton and South Coast Railway Company, he must ask relief against them; he has no right to sue the Direct London and Portsmouth Railway Company for acts done by his own corporation.

Mr. Turner and *Mr. Cole*, in support of the bill, cited—

Colman v. the Eastern Counties Railway Company, 10 Beav. 1; s. c. 16 Law J. Rep. (n.s.) Chanc. 73.

(1) 9 Sim. 30; s. c. 7 Law J. Rep. (n.s.) Chanc. 76; Cr. & Ph. 1; 10 Law J. Rep. (n.s.) Chanc. 53.

(2) 2 Hare, 461, 490.

(3) 11 Sim. 327; s. c. nom. *Preston v. Guyon*, 10 Law J. Rep. (n.s.) Chanc. 73.

(4) 1 Phil. 790; s. c. 16 Law J. Rep. (n.s.) Chanc. 217.

(5) 1 Hall & Twells, 85; s. c. 2 Phil. 740; 18 Law J. Rep. (n.s.) Chanc. 65.

(6) 7 Hare, 114; s. c. 18 Law J. Rep. (n.s.) Chanc. 193.

(7) 4 Beav. 158; s. c. 13 Law J. Rep. (n.s.) Chanc. 269.

Wilson v. Moore, 1 Myl. & K. 126, 337, 358.

Cohen v. Wilkinson, 18 Law J. Rep. (N.S.) Chanc. 411.

Richardson v. Hastings, 7 Beav. 323 ; s. c. 13 Law J. Rep. (N.S.) Chanc. 142.

THE MASTER OF THE ROLLS.—It seems to me clear that there is nothing more to be said upon the point of the right of one to sue. But, independently of that, the case amounts in substance to this, that the London, Brighton and South Coast Railway Company having in their hands certain monies, which were applicable to one purpose only, to the performance of one particular trust, and no other, and that authority, given to them by act of parliament, which, in consequence of their engagement to apply these monies for the purposes of their act of parliament, gave them very extensive power over the private property of very many individuals,—I say, they having these monies for that particular purpose only, and for no other, instead of so applying them did pay them to the Direct London and Portsmouth Railway Company, for another and quite different purpose: that is the case of the London, Brighton and South Coast Railway Company. On the other hand, the Direct London and Portsmouth Railway Company had full notice of the only legal purpose for which those monies could be applied. Having that notice, they nevertheless did avowedly receive the money for the purpose of applying it to an illegal purpose, for which it was expressly paid to them; that is the situation of the Direct London and Portsmouth Railway Company. Now, whether it is alleged in word or not, it is perfectly clear that both the parties to this transaction are guilty of fraud and collusion. They are guilty of fraud against the legislature, who gave them their powers for purposes entirely different, and they are guilty of collusion in together uniting and combining for the purpose of completing that fraud. But it is not necessary to say, that they have been guilty of fraud and collusion; it is enough to say that they were parties to the same breach of trust, one in paying and the other in receiving

these monies, for a known illegal purpose, to which neither of them had any intention to apply it, and this money is in the hands, or ought to be in the hands, of the Direct London and Portsmouth Railway Company. The question, therefore, is, whether the Direct London and Portsmouth Railway Company ought to be made a party to this suit, which seeks a declaration of the rights, and the recovery of this money, the money which they have received with knowledge that it was trust money, which ought to have been applied to a purpose entirely different. I have not the least doubt that they are properly made parties to this suit. They are not third parties, they have made themselves principal parties to this suit; they have themselves had the money, knowing the purpose to which it was to be applied; knowing, therefore, the persons to whom it belonged, and yet getting it out of the hands of the persons who had the management of it, for the purpose of applying it to other, and quite different, objects, I think there is no doubt that they are proper parties to this suit.

The question next is, whether this plaintiff, by himself, is entitled to sue under the circumstances. That he is entitled to sue, and to sue by himself, on behalf of other persons, against the London, Brighton and South Coast Railway Company has not been pressed, and very properly, because it would only have led to an idle consumption of time: this has not been denied. There is a right to do that. Well, but if there is a right to do that, is there not also a right at the same time to sue the persons who participate in, and receive the benefit of that illegal act, and who are claiming an interest, which, by this bill, they are alleged to do, in the maintenance of that illegal act? I must own that I find it very difficult indeed to give way to the objection in this case; at the same time, if there is a rule so laid down, and so applicable that there is not, in a case of this kind, in any individual, a right to sue on behalf of himself and others, where there is an injury done to the whole body, the whole corporation, without having first made the attempt to get the concurrence of the whole corporation—if there is such a rule laid down, it is not my province or duty to deviate from it; and

in that case I should enable this party to amend his bill, if it were necessary for that purpose. I do not at present feel persuaded that it is at all necessary to do that; for it is quite manifest that where the right is in any individual to sue one, there must of necessity, in order that justice may be done, be the right to sue those who are partners in that wrong so alleged to be done. Therefore I could not say, on principle, it is necessary. If there is not such a rule, I do not think I ought to lay it down in this case. I am rather apprehensive that I shall find, when I look at it, that the rule is not so strongly applicable that I must apply it. It has been alleged on the one side, that it is not applicable; that the rule is laid down in a state of things, and with that sort of relief prayed for, which does not make it proper to apply it to that particular case. On the other side, it is said that the rule laid down by Vice Chancellor Wigram, in *Foss v. Harbottle*, is the strongest, and that it ought to apply, and it is due to the argument that I should look at it. My present opinion is, that it does not apply; but I will look at it carefully, and will mention it if I find any reason to alter my opinion: if I do not, the demurrer must be overruled.

March 8.—THE MASTER OF THE ROLLS.
—I have further considered this case, and I see no reason whatever to alter the opinion which I formed. I think the bill may be sustained in this form, though there has been no attempt to get the concurrence of the other shareholders. I must, therefore, make the usual order, overruling the demurrer.

WIGRAM, V.C. }
1849. } GREEN v. BRIGGS.
July 14. }

Costs — Taxation between Party and Party—Third Counsel—Fees—Retainer—Attendance before Master.

The circumstance of the junior counsel being called within the bar after settling the pleadings and before the cause is at issue, will not of itself justify the plaintiff in retaining him as third counsel, and to the

allowance of his fees on the taxation of costs between party and party.

The retaining fee for counsel is not allowed on taxation of costs between party and party.

The fees for the attendance of counsel in the Master's office (except upon reference for scandal) were not allowed in taxation of costs between party and party, previously to the 120th Order of May 1845.

This was a petition by the plaintiff, for an order that the taxing Master might be directed to review his certificate disallowing certain fees of counsel. The cause is reported in 17 *Law J. Rep.* (n.s.) Chanc. 323 (1). Previously to the cause being at issue the counsel who had originally drawn the pleadings was called within the bar, but was retained by the plaintiff as third counsel, and briefs supplied to him at the hearing. The costs in the cause were ordered to be paid by the defendants as between party and party, and the taxing Master disallowed the plaintiff's claim for the costs and fees of his third counsel. The following cases were cited:—

Wastell v. Leslie, 14 Sim. 84; s. c.

13 *Law J. Rep.* (n.s.) Chanc. 368.

Carter v. Barnard, 16 Sim. 157; s. c.

17 *Law J. Rep.* (n.s.) Chanc. 278.

Attorney General v. Munro, 1 Hall & Twells, 457; s. c. 1 Mac. & Gor. 213.

The taxing Master had also disallowed the fees for retaining counsel and for the attendance of counsel in the Master's office (2).

At the request of the Vice Chancellor, the taxing Masters (Messrs. Follett, Mills, Baines, Martineau, Wainwright and Parkes) certified, first, that it was the practice on taxation of costs between party and party, to exclude the expense of retaining counsel, the 120th Order of May 1845 (3) not having authorized any alteration in the ancient practice of the Court in that respect; secondly, that before the said Order of May 1845, the expense of attending the Master's office by counsel

(1) S. c. 6 Hare, 395, 632.

(2) But see Orders X. and XI. of the 3rd of June 1850, as to attendance of counsel before the Master and allowance of fees. *Supra*.

(3) Ord. Can. 333; 14 *Law J. Rep.* (n.s.) Chanc. 296.

was never allowed in costs between party and party, except in cases of reference for scandal.

WIGRAM, V.C. said that the case of the plaintiff was simple although the briefs were lengthy; but His Honour did not think it required the assistance of three counsel. The fact of one having been called within the bar was certainly not a ground which entitled the plaintiff to be allowed the fees of more than two counsel.

Petition dismissed, with costs.

WIGRAM, V.C.	}	CLAY v. RUFFORD.
1849.		
Dec. 14, 15, 17.		
1850.		
Jan. 22.		
Feb. 14.		

Company—Fundamental Principles, Destruction of—Specific Performance—Partnership Deed, Proof of—Parties—Agreement, written, Term of original (parol) omitted in.

The execution of the deed of partnership of a company by one only of several co-plaintiffs, suing on behalf of themselves and the other partners, is not sufficient to sustain the suit if the objection is taken in limine; but the Court will give the other co-plaintiffs an opportunity of proving that they sustain the character in which they claim.

In a suit for the specific performance of a written agreement, the defendant will not be allowed to set up as a bar to the suit that the written agreement does not contain all the terms of the real agreement, unless the proof of the omission by mistake of some term in the written agreement be very clear.

In a suit by the Droitwich Patent Salt Company, for the specific performance of an agreement by the British Alkali Company to take a lease or transfer of the works, &c. of the former, it was objected, by the defendants, that such an agreement would be destructive of the fundamental objects of the plaintiffs' company, and the Court, at their request, sent this question to be tried at law.

This case was twice argued, the Vice Chancellor having allowed it to be opened

a second time at the request of the Solicitor General, in consequence of his misapprehension of His Honour's views respecting the admission of certain evidence. The object of the suit, the facts of the case and the grounds of defence taken by the defendants, are fully stated in the judgment of the Vice Chancellor.

Mr. Wood and Mr. Terrell appeared for the plaintiffs, and

The Solicitor General and Mr. Speed, for the defendants.

Feb. 14, 1850.—WIGRAM, V.C.—The plaintiffs in this case allege themselves to be managing partners of the company or partnership called the Droitwich Patent Salt Company. They allege also that the plaintiffs, Jacob Post, T. Blackett, J. Wheeley Lea, George Allies, W. Clay and D. Rutter, are the trustees of the plaintiffs' company, in whom the property of the company is now vested.

The defendant is a member of the British Alkali Company, and the company itself is sued in his name under the provisions of an act of parliament made and passed the 19th of May 1836.

Before and at the time of making the agreement of the 5th of May 1846, to which I shall presently refer, the plaintiffs' company was, or claimed to be, seised and possessed of, or entitled to certain lands, with the buildings and salt-works at Droitwich in the county of Worcester, subject to a lien for 3,000*l.* to one W. Clay deceased, and also to be possessed of the plant, steam-engine and other apparatus, stock of salt and machinery, used in the trade.

A treaty was entered into by the plaintiff, W. Clay, alleging himself to represent the plaintiffs' company, and by the defendant, Rufford, alleging himself to represent the British Alkali Company, for a lease or transfer of the plaintiffs' property to the latter. An agreement in writing, dated the 5th of May 1846, was afterwards drawn up and signed by the plaintiff, Clay, and the defendant, Rufford, containing the terms on which the lease or transfer was to be made.

Disputes afterwards arose between the

two companies (1), and to settle these disputes the present suit was instituted. The bill was filed on the 22nd of May 1847, and is by the plaintiffs on behalf of themselves and all other members of the Droitwich Company, and it prays, that the British Alkali Company may be decreed specifically to perform the agreement so entered into with the plaintiffs, bearing date the 5th of May 1846, and that the company, or the directors or trustees thereof, may be directed to accept and take from the plaintiffs a lease of the messuages, hereditaments and property comprised in the agreement, in conformity with the provisions of the agreement; and that it may be declared by the decree of the Court, that the plaintiffs are not liable prior to, or as the condition of the acceptance of such lease by the British Alkali Company, to execute or cause to be executed any repairs to the messuages, hereditaments, premises and property, and are not compellable to pay or allow to the British Alkali Company any sum of money in respect of the repairs or dilapidations thereof; and that the British Alkali Company may be decreed to pay to the plaintiffs what is now due and owing to the plaintiffs for rent of the messuages, hereditaments, premises and property, since the British Alkali Company took possession thereof, and also the sum of 3,952*l.* 3*s.* 1*d.* the balance of the amount agreed to be paid to the plaintiffs for the stock of salt, moveable utensils, boats and materials purchased by the British Alkali Company, with interest on such sums from the time the same ought to have been paid to the plaintiffs; and that a receiver may be appointed of the works and premises so agreed to be purchased by the British Alkali Company with all proper and necessary directions; and that the last-named company may be restrained by the injunction of the Court from further interfering therewith, and that the British Alkali Company may pay the costs of the suit.

To the relief prayed by this bill, the defendants have set up (I do not say improperly set up) every defence which

the law is supposed to afford them, and they have imposed upon me the duty of examining points which probably would never have occurred to the defendants as grounds for resisting the performance of the agreement of the 5th of May 1846, unless other and more serious objections had presented themselves.

The first point which they insist the plaintiffs are bound strictly to prove is, that they sustain the character of managing directors and trustees of the company, and that in such character they represent the Droitwich Salt Company within the rule, which, in certain cases, allows a few members of a partnership to sue on behalf of themselves and the absent co-partners.

In support of their case the plaintiffs have produced a deed, dated the 1st of March 1826, and made between the several persons whose names and seals are thereunto subscribed and affixed, except W. Clay, since deceased, J. Rutter, J. Post, S. Hashold, since deceased, T. Langley, since deceased, J. Fardan, H. Newman, since deceased, and T. Newman, of the first part, and the said W. Clay, since deceased, and the said J. Rutter, J. Post, S. Hashold, T. Langley, J. Fardan, H. Newman and T. Newman, of the second part, purporting to be the deed by which the Droitwich Salt Company was originally constituted. And, assuming that the plaintiffs sustain the character they lay claim to upon the record, I must *primá facie*, I think, assume that the deed is what it purports to be; for, in that case, the deed will come out of the proper custody; at least, if this proof be not sufficient, I should not hesitate to give the plaintiffs an opportunity of supplying the deficiency in their evidence. By the terms of the deed it is provided, amongst other things, that eight of the partners for the time being should at all times act as managing partners, with power to sell all or any of the partnership property, and that no other person except them should have a right to interfere in the management of the concerns of the partnership; and that they should hold meetings in manner provided by the deed; and that all proceedings of the managing partners should be entered in a book to be kept for that purpose, and to be signed by the secretary or clerk. Provision is also

(1) The matter of the agreement had been previously referred to the arbitration of Mr. Green-shields and his award made.

made for the annual change or re-election of the managing partners, and it is provided that a book should be kept by the managing partners, containing a list of the number of shareholders for the time being, and the number of shares held by each partner respectively. It is further provided that the shares are not to be transferable without the consent of the managing partners, nor otherwise than by deed to be executed by the vendee or transferee. That no person shall be eligible as managing partner who shall not have previously executed the deed or some instrument by which he covenants to abide by the regulations of it. The deed contains an express clause for the dissolution of the company, in manner specified therein. The above deed is set out in the bill. The bill also sets out another deed of the 18th of June 1834, providing for the manner in which alterations might be made, by which the fundamental rules of the partnership might be altered; and also a deed of the 31st of July 1840, by which the property of the plaintiffs' company was vested in the persons above mentioned, as trustees of the company.

The plaintiffs have produced the first-mentioned deed, and have proved by affidavit the signatures and handwriting of between fifty and sixty persons appearing to have signed the same; and supposing the parties, whose execution of the deed is thus proved, to be still shareholders of the company, their number will be sufficient to bring this case within the rule which allows a few persons, members of a partnership, to sue on behalf of themselves and their copartners; but it is remarkable that, of the persons named as plaintiffs on this record, one only (namely, the plaintiff Mr. Blackett) is amongst those whose execution of the deed of the 1st of March 1826 has been proved by the plaintiffs, and no evidence has been given of the execution by the other plaintiffs of the partnership deed, or any such deed as a purchaser of shares is required by the partnership deed to execute. The only evidence given that the plaintiffs are the managing partners of the Droitwich Salt Company is that of Mr. Bumsted, the secretary, who says in his answer to the second interrogatory,—“The said plaintiffs are the managing

partners of the said company; they were appointed to be so at a general meeting of the shareholders of the said company, held on the 24th day of February 1843, at which I attended as their secretary. A minute of their said appointment was entered by me at or about the time of the said meeting taking place, in the minute-book of the proceedings of the said company which was then in use.” The minute book of the company is not produced,—and the defendants have called for my judgment upon the sufficiency of this evidence.

I was prepared at the time of the argument to decide that, after all that had passed between the parties, if this proof were not sufficient, I would give the plaintiffs an opportunity of supplying the deficiency; but as the plaintiffs' counsel insisted that the evidence was sufficient, and that the plaintiffs ought not to be subjected to the expense and delay of further inquiry, I have been compelled to consider the point.

The plaintiffs' argument was, that Blackett at all events was proved to be a partner in the Droitwich Salt Company, and that if all the other plaintiffs were to be treated as strangers, the interest of Blackett alone would sustain the suit in its present frame. To the abstract principle, upon which this argument must be founded, I cannot accede. If the absent partners in a numerous partnership are to be bound by proceedings taken in their absence, it is indispensably necessary that those who represent them on the record should have interests identical with the absentees. I do not rely upon the principle of *The King of Spain v. Machado* (2) and other cases of that class, because where the objection which prevailed in those cases was not taken *in limine*, and the Court at the hearing was in a condition to make a final decree, I have sometimes found means, at the hearing of the cause, of getting over the objection. The principle I go upon is, that the Court, in making a decree which is to bind absent parties in a case like the present, is bound to ascertain by strict proof that the parties by

(2) 4 Russ. 225; s. c. 6 Law J. Rep. Chanc. 61.

whom the cause is conducted have the interest which they say they have. The utmost, therefore, which I shall at this moment decide is, that I will, if necessary, give the plaintiffs an opportunity of proving that they do sustain the character they claim, if it should be necessary to do so.

The next points to be ascertained are, whether the Droitwich Salt Company is bound by the agreement of the 5th of May 1846, entered into by Clay on their behalf, and whether the Alkali Company is bound by the signature of Rufford to the same agreement? The proceedings of the Droitwich Salt Company on the 2nd of June 1846 are for the present sufficient to bind the partners in the Droitwich Salt Company as between each other, and the proceedings of the British Alkali Company of the 9th of May 1846 are for the present sufficient to shew that the British Alkali Company must be held bound by the signature of Rufford to the agreement of the 5th of May 1846. I say "for the present" for the purpose of reserving to myself a discretion to make any of the preceding points the subject of inquiry, if the plaintiffs should appear entitled to relief in other respects.

I proceed, therefore, now to consider the substantive grounds of defence made to the bill. The first is, that the agreement in writing of the 5th of May 1846 does not contain all the terms of the agreement actually come to between Clay and Rufford on behalf of their respective companies. Secondly, that the plaintiff J. W. Lea had so acted under and with reference to the agreement of the 5th of May 1846, as to be precluded from asking the relief which is prayed by this bill, except upon terms of paying the money ascertained by Greenshields' award. Thirdly, it was insisted that the agreement of the 5th of May 1846 was destructive of the fundamental objects of the Droitwich Salt Company, and was not binding on the partners therein *inter se* (3).

In order to explain my views as to the first and second of these points, it is not necessary that I should go into the details

(3) Upon this point the defendants' counsel referred to *Bagshaw v. the Eastern Union Railway Company*, 7 Hare, 114; s. c. 18 Law J. Rep. (N.S.) Chanc. 198, and the cases there cited.

of the agreement between the plaintiffs and the defendants. The case made by the defendants upon the first of these points is this: that it was part of the agreement come to between Clay and Rufford, that the works comprised in the agreement of the 5th of May 1846 should be in fair tenantable condition, with pannage for the manufacture of salt in fair working order. Nothing of this sort is expressed in the written agreement, nor, as I understand the answer, does Mr. Rufford suggest that it was ever intended that any terms relating to the repairs should be contained in the written agreement. His understanding of the matter must have been, either that the repairs should rest in parol, or that the alleged stipulation as to repairs should be the subject of some separate writing, a point which I do not find suggested in the answer. It is scarcely necessary for me to say, that where an agreement between parties has been reduced into writing and signed by them, the proof must be very clear which should induce a Court to refuse to enforce the written agreement upon the ground that a term of the real agreement between the parties has been omitted by mistake; and I have examined the evidence in the present case for the purpose of seeing whether, if such a case had been set up here, the evidence now before me would be sufficient to prove it. I do not consider the case as really set up, because I do not think the answer does say that it was ever intended that should be in the written agreement. However I assume it to be so, and another reason was given for it.

The depositions certainly do not prove any such case. Of the depositions and documentary evidence, I may say that I think it highly probable that the subject of the repairs of the salt works, and the working condition of the pannage may have been the subject of notice and conversation between Clay and Rufford, during the treaty which terminated in the agreement of the 5th of May 1846, and Mr. Rufford may possibly have *understood* (a word which occurs in the correspondence) that something not actually defined by either party, should be done by the Droitwich Salt Company in the repairs of the works and pannage—and I give Mr. Ruf-

ford credit for not intending to overstate the case, when, giving his own impression of what passed between himself and Clay, he says, "it was expressly stipulated and agreed that the works should be handed over in tenantable repair, and the pannage in average working order." But, if I am to form my opinion from the evidence in the cause, I cannot conclude that any such precise stipulation or agreement was made or come to before the agreement of the 5th of May 1846 was signed by Clay and Rufford. I am satisfied, as I have already observed, that the depositions in the cause do not establish this point in the defendants' case, nor is the point established by the correspondence. Lea's instructions to the workmen would not *prima facie* be evidence for the plaintiffs, but the defendants have proved them, and they certainly do not prove the case the defendants seek to establish.

The claim of the defendants to the repairs is not asserted in the early part of the correspondence with that precision which the claim assumes in the letters between Clay and Rufford in October 1846, but in terms which confirm my opinion already intimated as to what the case really was. In a letter of the 30th of July 1846, which I presume was written by Rufford, he says, "It was understood that the works were to be handed over in an efficient state, and to be returned of the same efficiency if not purchased." The memorandum of the 3rd of July 1846, signed by Lea and Fardan, relates to the pannage only, and Rufford in a letter of the same date, speaking of the repairs of the pannage, says, "Although in this memorandum pans only are named, I apprehend your building ought to be put in tenantable order." This letter is scarcely consistent with the notion that Rufford, at the time of writing it, supposed that the Droitwich Salt Company was bound by a definite contract to put the works into tenantable repair, and the omission of this point in the agreement of the 5th of May 1846 is almost conclusive on the effect of the evidence. A statement by Rufford in July 1846, is of incomparably greater weight than one made at a later date after disputes had occurred. The agreement between Lea and Fardan to refer the repairs of the works to Green-

shields, on the subject of the paper of the 17th of the same month, in which they tell him the sense in which Lea and Fardan have used the word "repairs" in the memorandum of the 17th, has struck me as being not quite consistent with the supposition that they were referring to Greenshields an admitted agreement previously come to between Clay and Rufford. My conclusion upon this first point is, that the defendants cannot avail themselves of it as a bar to the present suit.

The second point stands on a very different footing. Assuming that no definite agreement had been come to between Clay and Rufford as to the repairs of the works and pannage, it is clear that the defendants asserted that such an agreement had been come to, and that issue was joined upon this between the two companies. It is clear also that Lea and Fardan, on behalf of their respective companies referred this matter to arbitration. This reference was acted upon and an award made in pursuance of it, and it is no new proposition that the settlement of such a dispute may be a good consideration to support the agreement come to between Lea and Fardan, and if Lea were sole plaintiff on this record seeking to enforce an agreement in which he alone was interested, I am not prepared to say that the Court would give him relief except upon the terms of his paying the sum awarded, although no binding agreement as to the repairs may originally have been made; and if I am right in this it becomes a question whether the plaintiffs, represented in part by Lea, can obtain relief except upon the terms of paying the sum awarded. All, however, which I need now decide is, that the transaction to which Lea was a party would not be a bar to the suit, but would affect the plaintiffs' right to relief only as a condition to be imposed upon them in case they should appear entitled to relief in other respects.

Upon the third and only remaining point, that which relates to the validity of the agreement of the 5th of May 1846, I shall accede to the defendants' request, and allow the question to be tried at law. The plaintiffs must submit to be bound by any order the Court may make for payment of the money awarded.

WIGRAM, V.C. }
1849. } THE ATTORNEY GENERAL
Nov. 19, 20. } V. LAWES.

Charity—Charitable Bequest—Costs.

The will of a testatrix directed her executors to pay 100l. a year to her bankers, for the sole use and benefit of any of the ministers and members of the churches then forming upon the apostolical doctrines brought forward originally by the late Edward Irving, who might be persecuted, aggrieved, or in poverty for preaching or upholding those doctrines; or half the sum might be appropriated for the benefit of the church founded by the late Edward Irving in Newman Street:—Held, that the above was a valid charitable bequest to the class ascertained by the Master.

The defendant, the administratrix and residuary legatee of the testatrix, admitted assets, and had set apart a fund to secure the payment of the above bequest:—Held, the suit being merely for the determination of the validity of the above bequest, that setting apart from the general estate a sufficient fund to meet the bequest, did not constitute such a severance as would exonerate the residuary estate of the testatrix from payment of the costs of suit, and that such costs were properly payable out of such residuary estate.

This was an information by the Attorney General, at the relation of the chief ministers of the seven churches or congregations in London, mentioned subsequently, belonging to the religious society formed by the late Edward Irving in 1832, when his connexion with the Established Church of Scotland was dissolved. The information was filed for the purpose of ascertaining the validity, as a general charitable bequest, of the following direction in the will of Ann Burrell, of Southall, spinster, dated in 1836, viz.:—"I direct my executors to pay Messrs. Drummonds, bankers, 49, Charing Cross, a clear yearly sum of 100l. for the sole use and benefit of any of the ministers and members of the churches now forming upon the apostolical doctrines brought forward originally by the late Edward Irving, who may be persecuted, aggrieved, or in poverty for

preaching or upholding those doctrines; or half the sum may be appropriated for the benefit of the church founded by the late Edward Irving in Newman Street."

The testatrix died in 1845, and letters of administration to her effects were taken out by the defendant, the residuary legatee named in the will. The defendant, by her answer, admitted assets, and the investment of a sum of 3,333l. 6s. 8d. stock, in her own name, for the purpose of meeting the annual payment, and stated that she had paid the dividends for two or three years into the bank of Messrs. Drummond, but that they had declined the responsibility of distribution; and that she was desirous of acting under the indemnity of the Court, in the event of the bequest being held to be charitable.

The Master, by his report, certified that he found as follows:—That Edward Irving, deceased, was formerly the minister of a certain church in Regent Square, in the parish of St. Pancras, in connexion with the Established Church of Scotland; and that in May 1832 he ceased to be such minister, and his connexion with the Established Church of Scotland was dissolved by the act of the said established church, or the authorities thereof, but that he thenceforth continued to be the minister of, and having pastoral care over, a majority of the persons theretofore communicants of the church in Regent Square, who withdrew therefrom upon the ejection of Edward Irving, and became under him a separate congregation or religious society, which had ever since continued and still continued to exist. That there were then divers congregations and ministers belonging to such religious society established in London and elsewhere in the United Kingdom of Great Britain and Ireland, all of which held and possessed certain lawful doctrines and tenets called apostolical, which were taught and prominently brought forward by Edward Irving during his life, and which were described and referred to as such in the will as originally taught by Edward Irving. That the doctrines referred to in the will of the testatrix as "the apostolical doctrines brought forward originally by the late Edward Irving," were the following, viz., the doctrine of the permanence of the gifts of apostles, pro-

phets, evangelists, and pastors in the church; the doctrine of the right of the church to the continuance of the miraculous powers and gifts of the Holy Ghost given on the day of Pentecost; and the doctrine of the necessity of the presence of that fourfold ministry, including that of apostles, and of those powers and gifts in the church, for the purpose of preparing and perfecting the church for the second advent of the Lord Jesus Christ; all which doctrines were taught and insisted upon by E. Irving, and were founded upon the doctrine of the true humanity as well as divinity of the Lord Jesus Christ, and became and were the basis of communion by which the ministers and religious congregations adhering to E. Irving, and to the doctrines taught by him after his separation from the Established Church of Scotland, were, and had ever since been distinguished from other denominations or communities of Christians in this country. That since the separation of E. Irving from the Established Church of Scotland, numerous churches, to the number of thirty-five, or thereabouts, in the whole, had been from time to time formed, in different parts of England, upon the basis of the doctrines so taught by him; and the worship and discipline of such churches had been and was conducted and ministered by certain ministers who were known among the members of such congregations by the title of apostles, assisted by certain other ministers of various orders, who were known among the members of such congregations by the several titles of prophets, evangelists and pastors; and the total number of communicants of such churches, besides those regularly attending the worship of such churches, was then very considerable, and not less than 4,000 persons, and that the number of the ministers of such churches was upwards of 270. That such churches were in progress of formation at the date of the will, and that the testatrix had full knowledge of the doctrines taught and maintained in such churches, and particularly of the doctrines taught and maintained by E. Irving in the church in Newman Street; and that the testatrix herself adhered to such doctrines, though she did not attend the public worship held in any of such churches. That many of the

persons who were then ministers and members respectively of such churches were, before they embraced such doctrines, ministers or members of the Church of England, or of other religious denominations; and divers of such persons before embracing the doctrines aforesaid were deriving a liberal or competent maintenance from preferments, salaried offices, or other employments, as clergymen, dissenting ministers, or schoolmasters and otherwise, in the Church of England, or in other religious denominations, and were deprived of such maintenance upon their embracing and professing the doctrines aforesaid, and in consequence of preaching or upholding the same, and were thereby reduced to a state of pecuniary distress and poverty, in which they had ever since been and then were, and which had been from time to time relieved by voluntary contributions and alms of other members of the same churches; and that others of the ministers and members of the said churches were, before embracing the doctrines aforesaid, engaged in secular professions, trades and employments, from which they were deriving a liberal or competent maintenance, and upon their embracing and upholding the doctrines aforesaid, and in consequence thereof, were deprived of such maintenance, either by the loss of custom and goodwill in their business, or by the disapprobation and discountenance of friends on whom they were dependent, or by the voluntary relinquishment of their several professions, &c. for the purpose of preaching the doctrines aforesaid, and devoting themselves to the ministry of religion according to the same doctrines; and by reason thereof, very many of the ministers and members of the said churches had become, and were in great poverty and affliction, and had been and were wholly or in part dependent upon pecuniary aid and support from the contributions of their richer brethren. That E. Irving at the time of his ejection from the Established Church of Scotland became the chief minister of the congregation belonging to the church or religious society formed by him, of the communicants who withdrew from the church in Regent Square at the time of his ejection

therefrom, and others who thereupon, and subsequently, joined the congregation, and which then began to assemble, and had ever since continued, and still continued to assemble for the purposes of religious worship, at a certain chapel, or place of worship, at 14, Newman Street, Oxford Street, in the county of Middlesex; and such chapel or place of worship was taken by Edward Irving in September 1832, as the lessee or tenant thereof, for the purpose of such religious worship, and that Edward Irving continued to be the chief minister of such congregation to the time of his death in November 1834. That upon the death of Edward Irving, the relator, Mr. C. Heath, became, and had ever since been, the chief minister of the same congregation, and also became the assignee of the lease granted to Edward Irving of the chapel or place of worship in Newman Street; and that the congregation and C. Heath, as the chief minister thereof, had always adhered to the doctrines taught by Edward Irving. That the testatrix knew that a congregation met for religious worship at 14, Newman Street, under the chief ministry of C. Heath, and that such congregation or religious society adhered to the doctrines taught and maintained by the late Edward Irving; and that the testatrix, in her lifetime, was in the habit of sending occasionally to C. Heath, as the chief minister of the church in Newman Street, small sums of money in aid of the poor belonging to that church; and that the congregation or religious society assembling in Newman Street for religious worship under the chief ministry of C. Heath, was the church described in the will of the testatrix as the church founded by the late Edward Irving in Newman Street. That, besides the church in Newman Street, there were six other churches or congregations then established in London, and respectively called the church in Bishopsgate, of which the relator, J. L. Miller, was the chief minister; the church in Southwark, of which the relator, A. Horn, was the chief minister; the church in Chelsea, of which the relator, H. J. Owen, was the chief minister; the church in Islington, of which the relator, W. H. Layton, was the chief

minister; the church in Paddington, of which the relator, M. C. Seton, was the chief minister; and the church in Westminster, of which the relator, C. E. Wallis, was the chief minister; and that there were divers other churches or congregations in connexion with the said churches at several other places in England, Scotland and Ireland; in all of which the doctrines preached by E. Irving were taught and professed. That from the year 1835 down to the present time, the chief ministers for the time being of the seven churches in London had the management and distribution of certain funds arising from a tenth part of certain payments voluntarily made by the several members of the congregations of the several churches established upon the doctrines maintained in London and elsewhere; the payments being paid as the tenth part or tithe of the clear income of the several members of the congregations and from certain other sums of money which had from time to time been voluntarily given or contributed on behalf of the poor ministers and members of the several churches or congregations; that the seven chief ministers had, during the same period, kept accounts in their names, at the bank of Messrs. Drummond & Co., of 49, Charing Cross, of all sums of money arising from the tenth part of the tithe so given or contributed respectively as aforesaid; that they had from time to time distributed and applied monies standing to the credit of such account in the relief of poor ministers and members of the said churches and congregations; and that such account was still kept with Messrs. Drummond, by and in the names of M. C. Seton, C. Heath, and H. J. Owen, on behalf of the seven chief ministers for the time being of the seven churches in London, for the purposes aforesaid. That the monies arising from the tenth part of the tithe so made as aforesaid of the several churches or congregations, from the 1st of January 1837 to the 31st of December 1848, had amounted in the whole to the sum of 21,017*l.* 6*s.*, and the monies arising from the sums voluntarily given or contributed by the several churches or congregations, for the poor ministers and members thereof, from the 1st of January 1837 to the 1st of De-

ember 1848, had amounted in the whole to 30,229*l.* 7*s.* 6*d.*, making a total of 51,246*l.* 13*s.* 6*d.*, the whole of which had been applied and distributed by the seven chief ministers for and towards the support of poor ministers and members of the several churches; and that notwithstanding such relief and assistance, great distress had been undergone by the poor ministers and members, and that the seven chief ministers had been unable adequately to meet the appeals which had been made to them by such poor ministers and members for pecuniary assistance, and had continually been obliged, from the insufficiency of the funds in their hands, in many cases to refuse such assistance when it was greatly needed, and ought, if possible, to have been rendered. That the doctrines referred to in the will of the testatrix, as the apostolical doctrines brought forward originally by the late E. Irving, were such doctrines as above mentioned, and that there was such a class of persons as above mentioned, answering the description contained in the will of the testatrix, who were persecuted, aggrieved, or in poverty for preaching or upholding those doctrines; but that no evidence had been given to shew what persons there were answering the said description. And that the church in Newman Street, above mentioned, was the church described in the will as the church founded by the late E. Irving in Newman Street.

At the hearing of the cause for further directions,

The Solicitor General, Mr. Roundell Palmer and *Mr. Toller* appeared in support of the information, and contended that the above gift was a valid charitable bequest, and cited—

Mitford v. Reynolds, 1 Ph. 185, 706; s. c. 12 Law J. Rep. (N.S.) Chanc. 40.

Nightingale v. Goulburn, 5 Hare, 484; s. c. 16 Law J. Rep. (N.S.) Chanc. 270.

The Attorney General v. Cock, 2 Ves. sen. 273.

Powell v. the Attorney General and Pendleton, 3 Mer. 48.

Mr. Kenyon Parker and *Mr. Bovill*, for the defendant, submitted that it was merely a bequest to a private charity for

the benefit of certain individuals. They cited—

Ommanney v. Butcher, Turn. & R. 260.

Morice v. the Bishop of Durham, 9 Ves. 399; s. c. (affirmed) 10 Ves. 522.

James v. Allen, 3 Mer. 17.

Williams v. Kershaw, 5 Cl. & F. 111.

Ellis v. Selby, 1 Myl. & Cr. 286; s. c. 4 Law J. Rep. (N.S.) Chanc. 69.

The Attorney General v. the Bishop of Oxford, 1 Bro. C.C. 444, n.

Flint v. Warren, 15 Sim. 626; s. c. 16 Law J. Rep. (N.S.) Chanc. 441.

Corbyn v. French, 4 Ves. 418.

As to the costs of the suit, it was submitted that they must be borne by the fund, as it had been severed from the general estate.

The Solicitor General replied.

WIGRAM, V.C.—The only doubt or uncertainty in my mind in this case arose out of the second alternative of this bequest: that is, the power to apply one half of the legacy to the chapel in Newman Street. But I am now satisfied that it does not make any difference in the case. If the gift had been confined to the first alternative, that is, to the ministers and members of the churches then forming in consequence of the events mentioned in the will, I think I should have had no difficulty in holding it a charitable bequest *in esse*. It would have extended clearly to all members who should thereafter adhere to any congregation, the nucleus of which had been formed, or the formation of which had been commenced, before the date of the will of the testatrix. I cannot help thinking that it would include any churches or congregations formed after that date, in consequence of the ejection of Mr. Irving from the Church of Scotland. The meaning clearly was, not merely to speak of the particular congregation which the testatrix knew to be in the course of formation, but to speak generally of congregations which might be formed in consequence of that circumstance. I am quite satisfied that would have been a general charitable bequest. Coupling the gift in Newman Street with it, I am by no means satisfied it may not be a gift to a charity. The question then

is, whether the gift is not to be sustained, because the testatrix has thought proper to give one half of the property to the congregation in Newman Street. It only goes to the extent of that half to be applied in that particular way. If there had been only a general power, and the purpose to which it was to have been applied had not been charitable, then the whole to some extent would have fallen within the principle of the case before the Master of the Rolls—*Williams v. Kershaw* (1). In this case there is a gift to a purpose which I think is a general charitable purpose, and then a power is given to apply half to another purpose. I cannot think that would take away from it the character of a charitable bequest. But there is no occasion to go into that question, for the benefit to the church in Newman Street would not be a bad bequest, and as to the other, the Master has found, and there is no exception to his report, that there are objects who might take.

As to the question of costs, I am very anxious not to shake a well-settled rule, which is, that where a legacy is severed from the bulk of the estate, and becomes the subject of litigation, the particular fund, and not the general fund, should bear the costs. The meaning of this rule is, that if the testator has given a legacy and it is severed from the estate, and a dispute arises between the persons to whom or to some of whom that legacy belongs, there the particular fund bears the costs. But if the question arises between persons claiming the legacy and the estate itself, as to whether the legacy is payable or not, that is not the case of a severance in the sense in which the rule applies, because until the Court makes a decree the legacy is not severed. It is still under its controul until the point is decided. If I were here administering the general estate, which but for the admission of assets I should have been, I should have ordered the costs to be paid out of the estate. Does the fact that the residue has been paid over make any difference? Can I treat it as paid over against the fact, that the residuary legatee is administratrix (supposing that makes

any difference), and that she submits to have the account taken and admits assets to pay the legacy in question? The admission of assets is an admission of liability to pay the costs of the suit, if they are properly payable out of the estate. I regard this simply as a contest between the residuary legatee and the estate itself, whether the legacy comes out of the estate or not. The mere fact that a sum is paid into the Bank until the decision is known cannot make any difference. I therefore think there must be a declaration that the bequest is valid, and a reference to the Master to approve of a scheme.

M.R. }
1849. } TAYLOR v. TAYLOR.
Nov. 16. }

Baron and Feme—Feme Covert—Attachment.

An order was made for an attachment against a married woman for want of an answer in a suit affecting her separate estate, she having obtained an order to answer separate from her husband.

Mr. Turner and Mr. Freeling, on behalf of the plaintiff, moved for an attachment against a married woman for want of an answer. The bill was filed on the 30th of June 1849; and on the 11th of August, and again on the 8th of October, she obtained further time to answer. On the 8th of November she applied for further time; but there being no affidavit in support of the application, it was refused. The suit affected her separate estate, and she had obtained an order to answer separate from her husband.

Naylor v. Byland, 9 Sim. 253.

Ottway v. Wing, 12 Sim. 90; s. c. 10 Law J. Rep. (N.S.) Chanc. 208.

THE MASTER OF THE ROLLS.—You may take the order.

[See *Dubois v. Hole*, 2 Vern. 613; *Travers v. Buckley*, 1 Ves. sen. 386; *Powell v. Prentice*, Ridgw. 258; *Tarleton v. Dyer*, 10 Ves. 442; *Bunyan v. Mortimer*, 6 Madd. 278.]

(1) In July 1835, before Lord Cottenham, then Master of the Rolls—see 1 Keen, 227, n.; s. c. 5 Law J. Rep. (N.S.) Chanc. 84.

K. BRUCE, V.C. }
March 8. } HIPKIN v. WILSON.

Mortgage—Proviso for Redemption.

By indentures, dated in December 1826, an estate was conveyed to C. by way of mortgage for the term of 2,000 years, and, subject thereto, to such uses as A. and B. should jointly appoint, with remainder, in default of such appointment, to A. for life, with remainder to B. in fee. By indentures, dated in December 1839, A, B. and C. conveyed the estate to D. (who had paid off the mortgage debt created by the deeds of 1826), in fee, by way of mortgage, with a proviso, that if A. and B. or either of them, their or either of their heirs, should pay the mortgage debt, D. would convey the estate to A. and B. and their heirs; and a declaration that, as between A. and B, the mortgage debt should be considered as a charge on the estate, and that A. should pay the interest in his life-time. B. died in the lifetime of A:—Held, that notwithstanding the proviso for redemption contained in the deed of December 1839, the estate, subject to A.'s life estate, was vested in B. absolutely.

By indentures, dated the 7th and 8th of December 1826, an estate, called "The Preen Estate," was conveyed to N. R. Clarke and G. P. Lowther, for the term of 2,000 years, by way of mortgage, with a proviso for ceaser of the term on payment by William Webster the father and William Webster the son, or either of them, or the heirs, executors, or administrators of them, or either of them, or the person or persons for the time being entitled to the freehold and inheritance of the said hereditaments to N. R. Clarke and G. P. Lowther, &c. of the sum of 10,000*l.* and interest; and, subject thereto, to such uses as William Webster the father and William Webster the son should by deed jointly appoint; with remainder to the use of William Webster the father for life, with remainder, in default of such appointment, to such uses as William Webster the son, in case he should survive his father, should by deed or will appoint; with remainder, in default of such appointment, to the use of William Webster the son and the heirs of his body;

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with remainder to the use of William Webster the father and William Webster the son, and their heirs.

Sir Charles Morgan and others paid off the mortgage debt of 10,000*l.*, and agreed to advance the further sum of 15,000*l.* on the security of the property comprised in the deeds of December 1826, and certain other property.

By indentures dated the 23rd and 24th of December 1839, William Webster the father and William Webster the son appointed the Preen estate, and conveyed the other property to Sir Charles Morgan and others in fee, by way of mortgage, to secure 25,000*l.* The proviso for redemption as to the Preen estate was as follows: "Provided always, &c. that if the said William Webster the father and William Webster the son, or either of them, their or either of their heirs, executors, or administrators do pay unto the said Sir C. Morgan, &c. the sum of 25,000*l.* on the &c., with interest for the same, after the rate of, &c., they, the said Sir C. Morgan, &c., will, upon the request and at the costs and charges of the said William Webster the father and William Webster the son, their heirs or assigns, convey and assure all and singular the said hereditaments and premises unto and to the use of the said William Webster the father and William Webster the son, their heirs or assigns, or unto such other persons as they shall direct or appoint." The indentures of release also contained the following clause:—"And it is hereby agreed and declared between the said William Webster the father and William Webster the son that, as between themselves, and without prejudice to the right of Sir C. Morgan, &c., to enforce payment of the said sum of 25,000*l.* and the interest intended to be hereby secured, the said sum of 25,000*l.* shall not be considered as the personal debt of either of them, the said William Webster the father and William Webster the son, but as a charge upon the aforesaid hereditaments; and that it is their intent and meaning that all interest which shall accrue in respect of the said principal sum in the lifetime of the said William Webster the father, shall be borne and paid by him."

William Webster the son died in Janu-

ary 1843, leaving a son. William Webster the father died in December 1843, having by his will made a general devise of all his real estate on certain trusts.

The bill, which was filed by the persons claiming under the will of William Webster the father, against the persons claiming the estate by virtue of the estate tail limited to William Webster the son, by the deeds of December 1826, prayed that it might be declared that, under the limitations contained in the indentures of the 23rd and 24th of December 1839, William Webster the father and William Webster the son became equitably entitled to the Preen estate as joint tenants, subject, with the other real estates therein comprised, to the mortgage thereby created; and that William Webster the father, having survived William Webster the son, became and was at the time of his decease, under the said indenture of the 24th of December 1839, solely entitled to the Preen estate, subject as aforesaid; and that the plaintiffs, by virtue of the will of William Webster the father, were entitled to the possession of the same estate, and to the rents and profits thereof, upon the trusts declared by the said will of William Webster the father.

The persons claiming under the estate tail of William Webster the son demurred to the bill for want of equity, on the ground that the proviso for redemption, contained in the deed of December 1839, had not the effect of altering the limitations of the estate contained in the deed of December 1826.

Mr. Malins and *Mr. Greene*, for the demurrer.

Mr. Swanston and *Mr. Rasch*, for the bill.—The rule may be admitted as laid down in *Jackson v. Innes* (1), that, where there is merely a reservation in the proviso for redemption conveying the estate from the person who was the owner at the time of executing the mortgage, there is a resulting trust for such owner. The question in such case is, whether there is or is not an intention that something more was to be done than the making the mortgage, and that the estate was, by the same deed, to be resettled. There is such an intention in this case.

(1) 1 Bligh, 104, 126.

They cited—

Lord Fauconberge v. Fitzgerald, Fitz. 207; s. c. 6 Bro. P.C. 295.

Anson v. Lee, 4 Sim. 364.

Barnett v. Wilson, 2 You. & C. C.C. 407; s. c. 12 Law J. Rep. (N.S.) Chanc. 428.

Clark v. Burgh, 2 Coll. 221; s. c. 14 Law J. Rep. (N.S.) Chanc. 398.

Knight Bruce, V.C.—The question intended to be raised on this demurrer is very clearly propounded and stated by the commencing part of the prayer of the bill. It is in these terms—[His Honour here read the prayer of the bill].—The question is, whether there is to be collected from the deed of 1839, as here stated, an intention to change the course of limitation, or the manner of settlement to any other extent than was necessary for the purpose of effecting the mortgage. Now, if no case had ever occurred upon the subject, and the point were clear of all authority, I should answer the question without any hesitation against the father and in favour of the son. The authorities appear to me not only not to contain anything at variance with that conclusion, but, upon the whole, strongly to support it. Although cases dependent on the intention to be collected from particular instruments must necessarily vary, as the particular contracts vary, there is a general principle of construction to be collected from them, and this principle is strongly against the contention of the plaintiffs. It would be sufficient for this conclusion, that there is not to be found in the deed of 1839 any expression of intention to vary the course of the settlement. The case, however, does not stop there. There is not only that absence of express intention, but there is what is tantamount to a declaration of intention the other way, namely, the provision respecting the mortgage debt, in which the father is required to keep down, during his life, the interest of the mortgage money,—a state of things consistent with the continuance of the limitations of the deed of 1826, but altogether inconsistent and at variance with the theory of the plaintiffs, that the father and the son became joint tenants. The demurrer must be allowed.

K. BRUCE, V.C. }
March 18, 19. } HAMILTON v. BANKIN.

Arbitration—Award—Parties.

A. and B. referred a matter in dispute between them to the arbitration of C, and C. made his award. Bill by A. against B. and C. to set aside the award on equitable grounds, but without proving corruption, partiality or fraudulent or unfair conduct on the part of C.:—Held, that C. was improperly made a party to the suit.

A. and B. referred a matter in dispute between them to the arbitration of C. A meeting took place on the 22nd of June for the purpose of carrying out the business of the award, at which A. was present a part of the time. On the 23rd, B. had an interview alone with C. on the business of the award, without the personal knowledge or assent of A. C. made his award. Bill by A. to set aside the award on the ground of his meeting on the 22nd. The Court, in continuation held, that under the circumstances appearing in evidence, A. ought to have been taken to have acquiesced in the interview on the 23rd, and sustained the award.

Whether the award could have been sustained in the absence of the implied acquiescence of A,—quære.

By an agreement in writing, dated the 20th of March 1847, and made between the plaintiff, Mr. Hamilton, on the one part, and the defendant, Mr. Bankin, a farmer, on the other part, it was agreed that Mr. Bankin should do certain works as ploughing, &c. on a farm of about 50 a. near Romford in Essex, belonging to Mr. Hamilton; and that, after the works were done, if Mr. Bankin should take a lease of the farm, he was not to be allowed anything for such works; but that, if he should not take a lease, Mr. Hamilton was to pay Mr. Bankin a reasonable sum for the labour bestowed on the farm. It was also agreed that, if any disagreement should arise between them as to the amount to be paid for the works, each party should nominate a referee; and that, if the referees should disagree, they should employ an umpire.

Mr. Bankin performed the works agreed upon, and decided not to take a lease.

Mr. Hamilton and Mr. Bankin disagreed as to the amount to be paid to Mr. Bankin.

In December 1847, Mr. Bankin appointed Mr. Matson, a farmer and valuer, as his referee, and in January 1848, Mr. Hamilton appointed Mr. Boards, also a farmer and valuer, as his referee. Mr. Boards fixed on 350*l.* as the amount due, Mr. Matson fixed on 250*l.*, and they, not being able to agree, on the 31st of May appointed Mr. Beadel, an auctioneer and valuer, as the umpire.

Mr. Beadel entered upon the duty imposed on him, and on the 26th of June 1848, made his award, by which he declared that Mr. Bankin was entitled to the sum of 298*l.* 14*s.* 6*d.*

Mr. Hamilton, being dissatisfied with the award, and having declined to pay anything to Mr. Bankin, Mr. Bankin brought an action against Mr. Hamilton on the award. Mr. Hamilton pleaded a great number and variety of pleas, and the action was tried at the Chelmsford Assizes; but, as there was, in fact, no defence at law to the action, a verdict was given for the plaintiff.

Mr. Hamilton then brought an action against Mr. Bankin for his use and occupation of the farm. This action was also tried at the Chelmsford Assizes, but, there being, in fact, no ground for the action, a verdict was given for the defendant. After the action on the award was brought, but before it was tried, Mr. Hamilton filed the bill in this suit against Mr. Bankin and Mr. Beadel the umpire, stating the above-mentioned circumstances relating to the award, and stating also other circumstances which are afterwards mentioned, and praying that the award might be set aside, on the ground that it was irregularly and improperly made, and that Mr. Bankin might be restrained from prosecuting his action on the award, and that the defendants Bankin and Beadel might pay the costs.

Under an order made in the cause, on a motion for an injunction by the plaintiff, the action on the award was allowed to proceed, but the costs of it were reserved, and execution was restrained; and, under another order, the plaintiff paid 298*l.* 14*s.* 6*d.*, the amount awarded, into court.

The cause now came on to be heard.

The questions in the cause turned on the events which took place on the 22nd and 23rd of June 1848. Different versions of these events were given by Mr. Boards in his evidence on behalf of the plaintiff, and also in his evidence given on behalf of the defendant; by Mr. Matson, in his evidence given on behalf of the defendant; and in parts of the answers of both defendants which were read by the plaintiff. The facts of the case appeared from these sources to be as follows:—

On the 22nd of June a meeting took place by appointment at the White Hart Inn, at Romford, for the purpose of carrying out the reference. There were present Mr. Beadel the umpire, Mr. Hamilton and his referee Mr. Boards, Mr. Bankin and his referee Mr. Matson, and his solicitor Mr. Rawlings. Before the business commenced, Mr. Hamilton desired that the business of the reference should be postponed, on the ground that his counsel, Mr. Serj. Shee, and his solicitor were not able to attend. This was objected to both by Mr. Matson and Mr. Beadel, who would only consent to it on the condition that Mr. Hamilton paid the costs of the day, which Mr. Hamilton declined. Mr. Rawlings then withdrew, and did not further appear on the reference. The business was then opened. After a short discussion it was agreed that, before proceeding further, the farm should be inspected by Mr. Beadel, with the assistance of Boards and Matson, and that, after such inspection the parties should return to the White Hart, and go on with the business. The meeting was adjourned for three hours for that purpose. Before the party broke up, Mr. Hamilton stated that he should not attend any more on that day. Beadel, Boards, and Matson then proceeded to inspect the farm in the way proposed. *After the inspection*, but before the return to the White Hart, *Boards called upon Mr. Hamilton, who was in the neighbourhood, and spent some time with him.* Beadel, Boards, and Matson then met again at the White Hart, and Boards stated that he had authority to examine witnesses on behalf of Mr. Hamilton. Witnesses were then examined and cross-examined, and various vouchers were produced, and Mr. Beadel was supplied with sufficient mate-

rials on which to ground his award. Before, however, breaking up, Mr. Bankin stated that he could clear up one or two points by means of his farming books, which however were then at his house, and could not then be produced. It was then agreed and arranged between all the parties that Mr. Bankin should call alone the next day at Mr. Beadel's house at Chelmsford, and shew Mr. Beadel the books in question. With reference to this arrangement, Mr. Boards stated as follows:—"I had no specific authority from the plaintiff to consent to Bankin's being examined alone, but I conceived that, under my general instructions to act for the plaintiff on the inquiry, I could allow it." Mr. Matson said, that the arrangement was entered into from the confidence that was reposed in Mr. Beadel by both of them, and to save expense. Mr. Bankin accordingly brought his books to Mr. Beadel's on the 23rd, and the items were inspected. On the 26th Mr. Beadel, as before mentioned, made his award. On the 29th the plaintiff was, for the first time, informed of proceedings which had taken place. The plaintiff then, as before mentioned, having declined to pay the amount, the action on the award was brought, and then the bill in this suit was filed.

Mr. Russell and Mr. C. Hall, for the plaintiff, contended, first, that the proceedings previously to the appointment that Bankin should go to Beadel's house were irregular. Secondly, that the arbitrator had no authority to appoint the meeting between himself and Bankin for the 23rd of June; thirdly, that the award was vitiated by the interview which had taken place between Bankin and Beadel on the 23rd—*Walker v. Frobisher* (1), *In re Hick* (2), *Harvey v. Shelton* (3), *Dobson v. Groves* (4), and *In re Plews and Middleton* (5); and, fourthly, that Beadel was properly made a party, as being liable to the costs of the suit—*Lingood v. Croucher* (6); this

(1) 6 Ves. 70.

(2) 8 Taunt. 694.

(3) 7 Beav. 455; s. c. 13 Law J. Rep. (n.s.) Chanc. 466.

(4) 6 Q.B. Rep. 637; s. c. 14 Law J. Rep. (n.s.) Q.B. 17.

(5) 6 Q.B. Rep. 845; s. c. 14 Law J. Rep. (n.s.) Q.B. 139.

(6) 2 Atk. 395.

being also a well-recognized rule as to solicitors—*Harvey v. Mount* (7).

At the close of the plaintiff's case,—

Knight Bruce, V.C. said—There are two portions of this case which I may dispose of at once. The award, although its legal validity has been established, may or may not have been erroneous—may or may not be successfully impeached in equity. No evidence, however, has been laid before me that induces me to suspect that Mr. Beadel acted corruptly, partially, or with any fraudulent or unfair intention. This being so, I am of opinion that he ought not to have been made a party to the bill. The bill must be dismissed, as far as he is concerned, with costs. Then as to the costs in the action. The award may or may not fail; it may or may not be my duty to set it aside. However this may be, I am of opinion that the defence to the action was litigious and vexatious, and that the costs at law ought to remain where they are, namely, with the successful party in the action.

Mr. Wigram and *Mr. Nichols*, for the defendant.—In this case the plaintiff's own valuer had fixed 250*l.* as the sum to be paid by him. The amount awarded is 298*l.* The only point then in dispute is 48*l.* For this claim he has been the cause of two very expensive actions, and now has brought to a hearing a very expensive suit in Chancery. Even this may not be all; for, if the award should be set aside on the grounds contended for by the plaintiff, since the defendant is entitled at any rate to something, there must be a reference to the Master or a fresh suit to enable him to get it. The plaintiff for such conduct is not entitled to any favourable consideration of his case. The award here may be sustained on two grounds: first, that the arbitrator had the power to fix the meeting for the 23rd of June—*Hewlett v. Laycock* (8), *Anderson v. Wallace* (9); and, secondly, that if there has been any irregularity, the plaintiff must be taken to have consented to it—*Atkinson v. Abraham*

(10), *Hall v. Lawrence* (11), *In re Tunno*, (12).

Mr. Russell replied.

Knight Bruce, V.C.—The bill is filed to set aside, on equitable ground, an award, not under the statute, which a court of law has decided to be legally valid. Now, as to the grounds upon which the plaintiff asks to have it set aside, there are some which are clearly out of the case. Corruption there is none, partiality there is none, fraudulent or unfair intention there is none, meaning, of course, by the expression "none," not any of the materials which might reasonably be expected. If, therefore, there has been mistake, it has been honest mistake; if there has been miscarriage, it has been honest miscarriage.

[His Honour then, after stating some of the circumstances of the case, said that the plaintiff's case totally failed as to any alleged irregularities, with the exception of the adjournment to Chelmsford and the examination of the defendant by the umpire, and that the case was reduced to those points.]

With regard to the regularity of the adjournment to Chelmsford, I am of opinion that the plaintiff's case wholly fails; for, if he was not present by himself or his agent sufficiently authorized, until the conclusion of the meeting on the 22nd, that must be considered as attributable to his own choice, and it is not competent to him to allege his absence effectually against his opponent. Whatever was done at that meeting, I must hold, was, for the purposes of this cause, done with the consent of the plaintiff. If he was not there he ought to have been there. The adjournment to Chelmsford, in my judgment, really bound the parties. Then comes the question whether what took place at Chelmsford was materially irregular, namely, the examination, in a certain sense, of the defendant, no person being present on the part of the landlord. I decline giving any opinion how that part of the case would have stood, even upon such a matter as a valuation of this kind, had the view which I have taken of the conduct of Mr.

(7) 8 Beav. 439; s. c. 14 Law J. Rep. (N.S.) Chanc. 233.

(8) 2 Car. & P. 574.

(9) 3 Cl. & F. 26.

(10) 1 Bos. & P. 175.

(11) 4 Term Rep. 589.

(12) 5 B. & Ad. 488; s. c. 3 Law J. Rep. (N.S.) K.B. 5.

Boards, the referee appointed by the plaintiff, been different from what I am about to state. I am of opinion that, from the whole of the evidence, including particularly the visit to the plaintiff by Mr. Boards after the return from the inspection of the farm, and before the resumption of the business at the inn, the just inference is, that Mr. Boards was the plaintiff's agent for the purpose of the residue of the business, and that Mr. Boards had power to acquiesce, and did acquiesce, in the course agreed to be taken, and which was taken, at Chelmsford. The consequence is that, in my opinion, no valid objection in equity has been established to this legal award. The bill must be dismissed, with costs.

K. BRUCE, V.C. }
May 2. } PATERSON v. MILLS.

Devise — Inheritance — Seisin — Reversions.

Real estate was devised to A. for life, with remainder to B. in fee. B. died in 1821, in the lifetime of A, leaving C. and D. her co-heiresses-at-law. C. died in 1824, in the lifetime of A, without having in any manner dealt with the property, leaving a son E:—Held, that it was not necessary to trace the descent as to C.'s moiety from B, but that E, for every purpose, ought to be taken as standing in C.'s place with reference to that moiety.

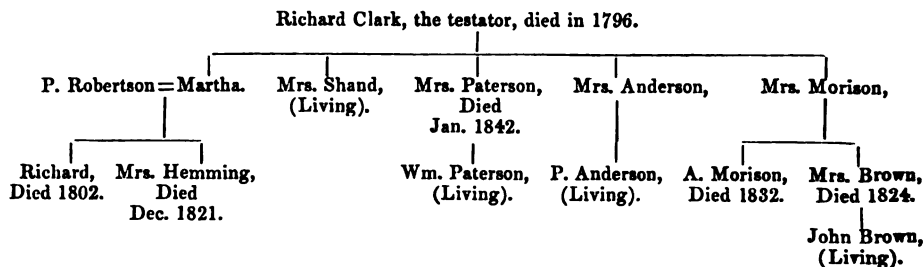
Richard Clark, by his will, dated the

11th of June 1796, gave and bequeathed unto S. Mills and T. Green, their heirs, executors and administrators, all his freehold and leasehold messuages or tenements therein mentioned, upon trust, that the said S. Mills and T. Green, and the survivor of them, and the heirs, executors and administrators of such survivor, should pay and apply the rents, issues, and profits thereof unto his daughter Martha for her life, and, after her decease, upon trust to stand possessed thereof and interested therein in trust for all and every the child and children of his daughter Martha, born at the time of her decease, share and share alike, as tenants in common and not as joint tenants; their respective shares to be assigned and conveyed to them when they should attain their ages of twenty-one years respectively.

The testator died in July 1796.

Martha Clark married Peter Robertson, and died in November 1839. Martha Robertson had two children only—Richard, who died an infant in 1802, and Elizabeth Hemming, who died in December 1821, intestate.

The state of the family sufficiently appears from the pedigree annexed to this case. Mrs. Shand, Peter Anderson, Ann Morison, Isabel Brown, and Mary Paterson were the heirs-at-law of Mrs. Hemming at her death. In 1824, Isabel Brown died intestate, leaving John Brown her only son and heir-at-law. In 1832, Ann Morison died intestate, leaving John Brown her heir-at-law. In 1842, Mrs. Paterson died intestate, leaving William Paterson her heir-at-law.



The bill was filed by William Paterson, Mrs. Shand, John Brown and Peter Anderson, against the surviving trustee, for the administration of the testator's estate. The

case is reported as to the construction of the will in 18 *Law J. Rep. (n.s.)* Chanc. 449. By the decree made at the hearing of the cause it was declared that Mr. An-

derson, Mrs. Shand, Mr. Brown and Mr. Paterson were equally entitled to the testator's real estates as tenants in common.

After the decree had been pronounced, a question was suggested, whether, according to the law of inheritance as it stood previously to the 3 & 4 Will. 4. c. 106, the property was not vested in the four claimants in unequal, instead of equal, shares; and, by the permission of the Vice Chancellor Knight Bruce, and the consent of all parties, the question was submitted to the Court on a motion as to the payment of a sum of money then in court arising from the rents of the property.

Mr. Russell and Mr. W. R. Ellis, for Mr. Anderson and Mrs. Shand.—Upon the death of Mrs. Hemming, Mr. Anderson, Mrs. Paterson and Mrs. Shand, as to three-fourths, Ann Morison, as to one-eighth, and Isabel Brown, as to the other one-eighth, became entitled to the real estates of the testator, in reversion expectant on the death of Mrs. Robertson, as co-parceners. Then Isabel Brown died in the lifetime of the tenant for life, leaving John Brown her heir-at-law. The following question then arises:—Did Isabel Brown's one-eighth descend to John Brown, or ought not the descent to have been traced to the last purchaser—that is Mrs. Hemming? It is contended that, upon the law as it stood before the 3 & 4 Will. 4. c. 106, the latter principle must be adopted. Before entering into this question, it may be useful to observe that the 2nd section of the 3 & 4 Will. 4. c. 106. says, that in every case descent shall be traced from the purchaser, and that the person last entitled to the land shall be considered to be the purchaser unless he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser. It has been decided in a recent case that, under this act, the descent in such a case as the present is not to be traced to the last purchaser—*Cooper v. France* (1). This case, however, is independent of the act, and is to be regulated by the law as it stood before the act. Having regard, then, to this, it is settled that, with reference to estates of freehold

in possession, there must be seisin to make a party the stock or root of inheritance. If A. died intestate, seised in fee of a freehold estate, leaving B. his heir-at-law, and B. died without having entered, the estate, on his death, would go, not to his heir, but to the heir of A. It is contended that, in the case of reversions a similar principle applies, and that, although entry is impossible in such a case, there ought to be a dealing with the property equivalent to entry; and that if there be no such dealing in the life of the tenant for life, the descent must be traced directly from the remainder-man, and not from the heir of the remainder-man. The estate here was devised to Mrs. Robertson for life with remainder to Mrs. Hemming. Mrs. Hemming died in the lifetime of Mrs. Clark, leaving Mrs. Brown entitled to one-eighth of the property as one of her co-heiresses. Mrs. Brown might, by a dealing with this share, as by a conveyance by lease and release, have constituted herself a stock of descent. She did not do so. On her death, the descent as to this one-eighth ought to have been traced afresh from Mrs. Hemming, that is, the one-eighth ought to have gone, not to her son John Brown, but to Mr. Anderson, Mrs. Shand, Mrs. Morison, Mrs. Paterson and John Brown.

Mr. Malins and Mr. J. J. Jervis, for John Brown, were not called upon.

KNIGHT BRUCE, V.C.—(after stating the facts as to the pedigree before mentioned)—said, that he thought that the contention on the part of Mrs. Shand and Mr. Anderson was as contrary to law as it was to reason and justice, and that, in his opinion, upon the death of Isabel Brown, her son, John Brown, for every purpose, must be taken to have stood in her place, and that the one-eighth part to which she had been entitled descended on him.

M.R. }
May 22, 23. } RICKFORD v. YOUNG.

Practice.—*Claim—Orders of 22nd of April 1850 to what they will be extended.*

Trustees and devisees of real and personal estate claimed to have the will of their

(1) *Post*, p. 313.

testator established against co-heiresses-at-law, and the trusts carried into execution, and the personal estate administered. The Court gave permission to file the claim.

Mr. W. Morris, under the 6th of the Orders of the 22nd of April 1850, applied to the Court *ex parte* for leave to file a claim of Thomas Rickford, George Pearson, and Richard Billings. It stated that they were executors and devisees in trust of William Parker, late of Henley-on-Thames, in the county of Oxford, deceased, who departed this life on the day of _____; that they had possessed themselves of the personal estate of the said William Parker to some amount, and had entered into possession and into the receipt of the rents of his real estate, and that they were willing and desirous to account for the same, and that the will of the said William Parker should be established, and the trusts thereof performed and carried into execution, and that the whole of the personal estate of the said W. Parker should be duly administered by and under the direction of this Court, for the benefit of all persons interested therein or entitled thereto, and that Edward Young and Mary his wife, and Thomas Christopher Wood and Ann his wife, were respectively interested in such real and personal estate under the will of the said W. Parker. And the said T. Rickford, G. Pearson, and R. Billings claimed to have the said will of the said W. Parker established against the said Mary Young and Ann Wood, his co-heiresses-at-law, and to have the trusts thereof performed and carried into execution, and the personal estate of the said W. Parker applied in a due course of administration by and under the direction of this Court, and in the presence of the said E. Young and Mary his wife, and T. C. Wood and Ann his wife, and such other persons interested in the said estates as this Court might be pleased to direct, or that the said E. Young and Mary his wife, and the said T. C. Wood and Ann his wife might shew good cause to the contrary, and that the costs of this suit might be provided for; and for these purposes that all proper directions might be given and accounts taken.

This claim was signed by counsel, and

at the request of the Master of the Rolls was left with him, together with a copy of the testator's will.

May 23.—THE MASTER OF THE ROLLS.
—I have read this claim, and give permission to file it; the Registrar, therefore, will make the requisite indorsement.

WIGRAM, V.C. }
Jan. 21. } HOOD v. HALL.

Trustee and Mortgagee Act, 11 Geo. 4. & 1 Will. 4. c. 60.—*Appointment of Person to convey.*

In a creditors' suit a decree was made that the equity of redemption in estates of a testator devised by him, subject to certain mortgages and incumbrances, should be conveyed to such of the respective mortgagees as should be willing to release the testator's estate from their respective debts. The devisees under the will (two of them being married women) refused to execute a deed of such conveyance, tendered to them by a mortgagee, and approved by the Master. On the petition of the mortgagee, presented under the Trustee and Mortgagee Act (11 Geo. 4. & 1 Will. 4. c. 60,) a person was appointed by the Court to execute the conveyance in the place of the devisees.

This was the petition of Benjamin Tullock, a mortgagee of part of the real estates devised by the testator mentioned in the pleadings, and for the administration of whose estate a creditors' suit had been instituted. The petition was presented under Sir Edward Sugden's Trustee and Mortgagee Act (1), and stated (*inter alia*) that the testator had devised the mortgaged property to one John Hudspeth (since deceased), and his five infant daughters (two of whom had since married), as tenants in common in fee. By a decree made in the cause, at the hearing on further directions, it was, amongst other things, ordered that all necessary parties should execute to such of the mortgagees as should be willing to release the testator's estate from the respective mortgage debts, a conveyance

(1) 11 Geo. 4. & 1 Will. 4. c. 60.

of the equity of redemption of the premises in mortgage, such conveyance to be at the expense of the mortgagees, and to be settled by the Master in case the parties differed.

Under this decree the petitioner procured the draft of a deed of such conveyance to be settled and approved of by the Master. All the surviving devisees and their husbands refused to execute the deed of conveyance when tendered to them by the petitioner for execution.

Mr. Bates, in support of the petition, relied upon the effect of the decree, and urged that the married devisees could not be compelled by the process of the Court to execute the deed. He cited *King v. Leach* (2).

WIGRAM, V.C. made the order, upon the express ground of a decree having been made in the cause, and which authorized the petitioner to require the conveyance.

V.C. }
March 4. } COOPER v. FRANCE.

Statute 3 & 4 Will. 4. c. 106.—Descent.

G. T., seised in fee of certain hereditaments, died intestate, leaving two daughters, Ellen and Sarah. Both daughters died intestate, each leaving a son. It was contended for George, the son of Ellen, who died first, that under the 2nd section of the act 3 & 4 Will. 4. c. 106, upon the death of Ellen her moiety descended equally between him and Sarah, as co-heirs of G. T., the original purchaser; and that upon the death of Sarah, her original moiety as well as the half of Ellen's moiety, descended equally between her son and the son of Ellen, as co-heirs of the original purchaser:—Held, that the said statute was not intended to apply to cases which were plain before it was passed; and that the moiety of each daughter descended upon her son.

The bill stated that George Tomlinson died intestate on the 13th of April 1826;

(2) 2 Hare, 57. And see *Billing v. Webb*, 1 De G. & S. 716.

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and that at the time of his decease he was seised in fee of certain hereditaments in the county of Middlesex; that the intestate left two daughters, his co-heiresses-at-law, namely, Ellen Cooper and Sarah France, who entered into and continued in the possession of the property until their deaths; that Ellen Cooper died intestate on the 1st of June 1835, leaving George Cooper her eldest son and heir-at-law; that Sarah France died intestate on the 16th of January 1839, leaving Benjamin France her eldest son and heir-at-law. The bill was filed by George Cooper against Benjamin France for a partition, and a question was raised for the decision of the Court as to what shares in the property belonged to the plaintiff and the defendant, and as to what effect the 2nd section of the 3 & 4 Will. 4. c. 106 (1) had upon the case.

Mr. Roll and *Mr. Willcock*, for the plaintiff George Cooper, contended, that he was entitled to five-eighths of the property; that by the 2nd section of the 3 & 4 Will. 4. c. 106. it was directed that in every case descent should be traced from the purchaser. The person last entitled to the land was to be considered to have been the purchaser, unless such person had inherited the same, in which case, the person from whom he inherited was to be considered the purchaser; consequently in this case George Tomlinson was to be considered the purchaser, and therefore on the death of Ellen Cooper her moiety descended equally upon her son, George Cooper, and Sarah France as co-heirs of George Tomlinson, and upon the death of Sarah France, her share, consisting of her original moiety and the moiety of her sister's share, being six-eighths of the property, descended

(1) 3 & 4 Will. 4. c. 106. s. 2. "And be it further enacted, that in every case descent shall be traced from the purchaser; and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the person last entitled to the land shall for the purposes of this act be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser, unless it shall be proved that he inherited the same, and in like manner the last person from whom the land shall be proved to have been inherited shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same."

in like manner upon her son Benjamin France and George Cooper as the co-heirs of George Tomlinson. By this means George Cooper, the plaintiff, was entitled to two-eighths of his mother's moiety, and three-eighths of Sarah France's moiety.

Mr. Malins and *Mr. Shee*, for the defendant, Benjamin France, contended that he was entitled to one moiety of the whole property; that the section of the act referred to did not affect this question, for otherwise it would produce this absurdity:—that Benjamin France would take one-eighth less after the passing of the act than before it. It never could have been the intention of the legislature to alter or unsettle the law where it had always been perfectly clear; and in this case, under the law as it stood before the act, Ellen Cooper's moiety would have descended upon her son George, and Sarah France's moiety upon her son Benjamin. This rule had always been applied to questions which had been raised with regard to a barony. The descent was always traced separately, and the heir of each co-heiress succeeded to the rights of his mother. If any other construction were to be acted upon, the eldest son of a co-heiress would no longer be the heir of his mother, but though the act directed the descent to be traced from the original purchaser, still it did not regulate the mode of descent, it merely stated that none who were not of the blood of the purchaser should take, and what the parent had, the issue would take, only qualified with this, that such issue must be of the blood of the purchaser.

THE VICE CHANCELLOR.—I cannot see that there is any doubt about this case. The question is, whether the act applies to cases which were perfectly plain before the act;—whether, where a lady dies leaving one child only, there is any necessity for making a question about the descent. I cannot suppose that the act even meant to introduce doubt into a case which was so plain that before the act no doubt could have existed. It seems to me that the meaning of the act was to leave the law of inheritance, in cases absolutely plain, just as it found them, and only to lay down rules where there was any doubt existing. In looking at the purview these words occur, “to the intent

that the pedigree may never be carried further back than the circumstances of the case and the nature of the title require;” and then the 2nd section says, that the person last entitled to the land shall be considered to be the purchaser thereof, unless it shall be proved that he inherited the same; but it appears to me that the act is then speaking only of what ought to be the rule where the case is doubtful. I cannot say that the act shall be so construed as to give a new rule where no doubt existed before the act. The act was passed expressly to make the thing clear, and it would be absurd to construe it so as to raise a doubt upon what was already perfectly clear. I was at first inclined to think this case ought to have been sent for the opinion of a court of law, but I must say that it now appears to me so clear, that I shall not send it to law; I shall therefore make a declaration that one moiety did, upon the death of Ellen Cooper, descend on her son George Cooper, and the other moiety did, on the death of Sarah France, descend upon her son Benjamin France.

L.C. 1849. Dec. 8, 13, 14, 17. 1850. Jan. 14.	}	THE ATTORNEY GENERAL v. THE CORPORATION OF LONDON AND OTHERS.
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Discovery—Pleading—Agency—Costs of the Attorney General.

A plaintiff is entitled to discovery, not only of that which constitutes his own title, but also to discovery for the purpose of repelling an anticipated defence; and also to discovery of what the case is which the defendant relies upon, and how it is made out; that is, the grounds and foundation of the defendant's title, but not to the discovery of the evidence by which it is intended to be supported.

The information charged that the defendants claimed under some charter, &c., and that certain charters and documents were in the possession of the defendants relating to the matters aforesaid (that is, the plaintiff's title), and that none of such documents contained any grant to the defendants of, or recognition of their title to, the matters

in question in the suit:—Held, that the defendants were bound to answer, whether they claimed under some charter, and as to the possession of such documents, and whether or not they contained any such grant or recognition, and that they could not excuse their production by stating their belief that such documents did not contain evidence of the plaintiff's title, but must distinctly negative the grounds upon which the plaintiff called for their production.

It is not sufficient for a defendant, in order to protect himself from production of documents, to negative the plaintiff's title; but he must set out such a title in himself as, if proved, would shew that he is entitled, and not the plaintiff.

An agent claiming an adverse title, proved by acts of ownership, must distinctly negative the conclusion that such acts of ownership are to be attributed to his character of agent.

The right of discovery is the same between the Crown and a subject as between subject and subject. The stat. 21 Jac. 1. c. 14. has no application to suits in equity.

The rule that the Attorney General neither receives nor pays costs, will in future be modified in this way, namely, that the Attorney General never receives costs in a case in which he might have been liable to pay costs if he had been a private party.

This was an appeal by the defendants, the corporation of London, from a decision of the Master of the Rolls, overruling exceptions to the Master's report, which certified the insufficiency of the answer, and that the costs of the exceptions and of the reference thereon ought to be borne by the corporation of London. The information and the answers, and the exceptions thereto, are fully stated in the report of the hearing before the Master of the Rolls, 18 *Law J. Rep.* (N.S.) Chanc. 314, 339.

Mr. Bethell, Mr. Serjeant Merewether, and Mr. Randell, for the appellants.—The title set up by the information is a title *jure coronæ* to the bed and soil of all navigable rivers between high and low water mark. The title requires no evidence to support it, and therefore the only object of the Crown, in calling for the discovery in question, is to impeach the defendants' title; for the

documents inquired after belong exclusively to the defendants, and constitute their title. The title of the defendants is also evidenced by a long series of acts of ownership on the part of the defendants, and by numerous applications on the part of the Crown to the defendants to make grants of the bed and soil for purposes of public benefit. The information secondly charges that if the Crown is not entitled to the bed of the river, then it has a right to complain of the rights of its subjects having been interrupted by obstructions of the river caused by the defendants in neglect or abuse of their duty as conservators. It was contended in the Court below, that the grant of the office of conservator was in respect of the territorial ownership of the Crown in the bed of the river; but such grant is not to be referred to the prerogative, but to various acts of parliament. The Crown has no further right to discovery than an individual; and the defendants by their answer claim the benefit of the statute 21 James 1. c. 14, an act to admit the subject to plead the general issue in informations of intrusion brought on the behalf of the King's Majesty, and retain his possession till trial. On the question of costs, the established rule is, that the Attorney General neither receives nor pays costs—*Smith v. Earl Stair and Her Majesty's Officers of State in Scotland* (1), *Bolton v. the Corporation of Liverpool* (2).

The Solicitor General and Mr. Maule, contra.—The defendants must set forth upon the record the title they claim with sufficient clearness; for the plaintiff is entitled to a discovery of the case upon which the defendants rely, and of the manner in which they mean to support it—*Lord Redesdale's Treat. on Pleading*, p. 9, *Wigram on Discovery*, p. 285, *The Attorney General to the Prince of Wales v. St. Aubyn* (3). The Crown is bound to state its title upon the information, and the subject is also bound to state his title in order that the Crown may meet it. The statute 21 James 1. c. 14. has no application to proceedings in equity, and the Crown is only asking for that discovery

(1) 6 Bell, 487.

(2) 3 Sim. 467; s. c. on appeal, 1 Myl. & K. 88; 1 *Law J. Rep.* (N.S.) Chanc. 166.

(3) Wightw. 264.

which every plaintiff is entitled to require—*Balls v. Margrave* (4). The acts relied upon as evidence of ownership may be equally referred to the defendants' character of conservators; and that very office gave them opportunities of encroaching on the rights of the Crown without question. As to the costs they cited—

The King v. Hassell, 13 Price, 279.

The Attorney General v. the Earl of Ashburnham, 1 Sim. & S. 394.

The King v. Miles, 7 Term Rep. 367.

Mr. Bethell replied.

Dec. 17.—THE LORD CHANCELLOR.—The information in this case comes before me on appeal from the decision of the Master of the Rolls, who held the answer insufficient. The information states the title of the Crown to the bed of the River Thames; first, as a general proposition, that the Crown is entitled to the land and soil under all navigable rivers; secondly, as a distinct averment, that the Crown is seised of the port and haven of London, and of the River Thames: and it states as the reason, "the same being an arm of the sea into which the sea had always flowed and reflowed." There is, therefore, not only an averment of the general right from which the title to the particular river would flow, but it also distinctly avers a right in the Thames by reason of its being an arm of the sea and a navigable river. It then states that the mayor and commonalty have at all times held the office of bailiff or conservator of the River Thames; and it then sets out that the corporation claim a freehold in the soil, and that under that claim they have made certain grants alleged to be supported by their possession of the freehold, but the information alleges that they are bad in that respect as well as by their being injurious to the navigation of the Thames, and therefore nuisances; and that supposing the corporation had such right of freehold, yet as conservators they would be obnoxious to the charge of committing nuisances injurious to the navigation. Then comes something which, though not immediately

connected with the plaintiff's title, is nevertheless a legitimate mode of pleading, anticipating the defence which may be set up; it makes the defendants pretend that the corporation had a grant of the bed of the river from the Crown, and it then charges, in answer to such supposed defence, that there is no such grant to the corporation in any charter from the Crown. It then states a pretence on the part of the defendants that they have some charters, not indeed containing a grant, but which recognize such grant; and it charges in answer to that, that there is no charter recognizing such grant. Another pretence is, that there is a grant of Henry VI. which includes the soil and bed of the river, and this is also met by a similar negative; and that if any such grant was ever made, it has been revoked. It then states a pretence, that the corporation are entitled by immemorial possession proved by certain acts of ownership; and then in answer to that there is a charge negating that allegation and stating that the embankments are nuisances. Then comes the usual charge that the parties have in their possession papers and documents generally relating to the matters in question.

To that information the defendants put in an answer in which they deny the title of the Crown to the bed of the river. They leave it as a matter of law, whether there is any such general right in the Crown as that claimed by the bill, but they meet the fact of the title of the Crown to the soil and bed of the river Thames by a direct negative. They say the Crown is not entitled, but that they, the defendants, are entitled to the soil. Now it is quite clear that that is only a denial of the plaintiff's right, setting up no other title in themselves than what may arise from possession. Now, nothing can be more clear, both from authority and universal practice, than that a plaintiff is entitled to discovery, not only of that which constitutes his own title, but also to discovery for the purpose of repelling the anticipated defence. The plaintiff now endeavours to obtain for himself what he would have formerly got by a replication, by anticipating the defence and alleging those facts which, if true, would shew that such a defence

(4) 3 Beav. 284; s. c. 10 Law J. Rep. (N.S.) Chanc. 36

would not prevail against him. A common instance is that of a release, which the plaintiff thinks he can impeach, leaving untouched the question of the original title. If the plaintiff is right in that supposition, he charges that which he endeavours to shew would prevent the release from operating against him.

But a more ordinary case, and one more closely analogous to the present, is that where the plaintiff anticipates the defence of a plea of purchase without notice; because in the case of a release the plaintiff generally would have a further relief, namely, getting rid of the release; but in the case of a plea of purchase without notice as a matter of defence, he gets rid of the expected bar to his original title, and if that is good he is entitled to the benefit of the decree at once, and wants no additional decree by reason of his being able to beat down the expected defence by charging circumstances which would shew that there was notice. Now, that is the ordinary case where a plaintiff can anticipate the defence. But it is obvious that there may be a defence which he cannot anticipate; then there is a universal practice (a practice I can speak of from many years experience) in order to enable the plaintiff to meet the whole case that may be made against him, to ask the defendant what his defence is. It was said, in argument, that a bill of discovery has only two objects: one for the plaintiff to discover that which constitutes his own title, and the other to discover what the defendant intends to set up as his own defence. But I apprehend that the plaintiff is entitled not only to discovery to shew his own title, but also to discovery to repel the defence which he anticipates will be set up; and we have the authority of Lord Redesdale and of Wigram, V.C. as to that. Lord Redesdale says, "the plaintiff has a right to the discovery of the case upon which the defendant relies, but not of his proofs"—*Treat. on Pleading*, p. 190. He has a right to know what the defendant relies upon in order that he may meet such defence, but he has no right to ask, what is your evidence? The Vice Chancellor Wigram rather quarrels with the generality of that proposition (*Wigram on Discovery*, p. 285) and says, "that a plaintiff is entitled to a discovery of the case

on which the defendant relies; that is, that the plaintiff is entitled to know what the case is, admits of no doubt." It does admit of no doubt; that is the most usual course. But if the plaintiff apprehends that the defendant will not put it in issue, and he wishes for more information about it than he thinks he is likely to get without putting a further question, he has a right to know what the defence is. It is quite a different matter that he is not entitled to the evidence upon which that defence is intended to be supported. The language of Lord Redesdale seems rather to have been misunderstood by the Vice Chancellor Wigram, because, when Lord Redesdale says, the plaintiff is entitled to a discovery of the case on which the defendant relies, and how he makes it out, he only means he has a right to know what the case is, but not to see the evidence by which it is to be supported. It is not sufficient for the defendant simply to deny the title of the plaintiff and assert a title in himself, but he must shew a title which, if proved, would entitle him and not the plaintiff. This will not entitle the plaintiff to see the documents, for Lord Redesdale himself says (*Plead.* p. 190, 5th ed.) the plaintiff is not entitled to see the defendant's proofs. We have it, therefore, established by authority that the plaintiff is entitled to know what the defendant's case is and how he makes it out, but not to see the proofs by which it is to be established.

Now, it is said that the statute of James gives the party against whom the Crown is litigating an advantage different from that which belongs to every other defendant. But the object of that statute was, that the party contesting with the Crown should be in the same situation with those contesting with any other plaintiff. In equity there was never any different rule in a litigation with the Crown and a subject; and therefore there was no evil to be remedied. But at law there was a very serious injury from a privilege which the Crown maintained against the party proceeded against, namely, that the title of the Crown was taken to be proved unless a contrary title was set out; but there is no such privilege here on this subject, namely, as to the extent to which the defendant is bound to set out his answer.

But what have these defendants set out? They have set out a negation of the plaintiff's title; but they have set out no distinct title in themselves. The fact of the conservancy is admitted, and that, they say, is distinct from the title to the soil. But the exercise of that office may give the party an opportunity of doing acts of ownership which without such title or office could only be referred to an adverse title. The defendants, therefore, must clearly distinguish between acts done in respect of their title as agents and those done in respect of an adverse title, in order to negative the plaintiff's title. And in order to see how far those acts of agency negative the plaintiff's title by shewing an adverse title in the defendants, it never must be lost sight of that the defendants are conservators.

But it has been said, that it is not the corporation who are conservators, but the mayor who is conservator. Upon the answer, however, there is a most distinct statement that the corporation are conservators, and that they exercise that jurisdiction by means of the lord mayor, but that the right of conservancy is in them. Even if that is stated broader than the charters warrant, it matters nothing to the present question; for it is the title under which they are claiming. The plaintiff is entitled not only to a discovery of that which constitutes his own title, but he is entitled to a discovery of everything which may enable him to defeat the title expected to be set up against him. Let us see how it has been dealt with on decision. It has been so stated by Lord Redesdale (*Plead.* p. 9) and by Wigram, V.C. (*Wigram on Disc.* p. 285). In *Jones v. Davis* (5), *Evans v. Harris* (6) and *Harland v. Emerson* (7) it is very distinctly stated, not only as no new decision, but as the recognized practice of the Court; and in *Stroud v. Deacon* (8), the bill charged that a deed, which was the defendant's title, contained evidence that would defeat it; and the defendant was compelled to answer. Now, this is clear from the general practice, that if a defendant pleads that a certain deed forms part

of his title, he cannot be compelled to produce it. But if the plaintiff alleges that the deed contains something which recognizes the plaintiff's title, he is compelled to answer, though he may not be bound to produce it, if he negatives the plaintiff's charge. For though it constitutes the defendant's title, yet it is part of the plaintiff's evidence, for he may find in it a recognition of that which, if true, would supersede the title constituted by that deed. There are several other cases besides those I have mentioned where the point was raised. There was one in particular, the name of which I have not; but which was a bill for tithes. A cross-bill was filed, which alleged that certain documents belonging to the other side contained a recognition of a certain modus. Though the documents belonged to the opposite party, yet, as it was alleged that they contained something which would be evidence of the plaintiff's title, the Court ordered that an answer should be made, and also production of that part of the book which contained the entry. The general principle to be deduced from the cases I have cited shews the protection thrown around the defendant, that he shall not be compelled to produce the evidence of his title; but if he will take advantage of that, he is bound to negative that which the plaintiff alleges the document to contain, so far as it would be evidence of the plaintiff's title. And the rule is so, whether the charge be of something to be found in the document itself, or of the absence of something from the document; for the circumstance is alleged, not for the purpose of investigating what the defendant may have to set up as proof of his title, but for the purpose of establishing the plaintiff's title or of repelling the anticipated defence; all of which are legitimate purposes of discovery.

With these preliminary observations and these references to authority, I proceed to consider the particular exceptions; first, however, observing that the case relied upon, of a defendant not being bound to produce evidence of his title, has very little application to the present case, where the defendants have, in fact, set up no title. Great discussion has sometimes taken place as to the effect of a negative plea; but a

(5) 16 Ves. 262.

(6) 2 Ves. & B. 361.

(7) 8 Bli. 62.

(8) 1 Ves. sen. 37.

negative answer is quite a new case. Now the first question is, "Whether it is not true that no charters or letters patent contain any grant of the soil, &c., to the mayor, commonalty, and citizens, &c.?" If the plaintiff is right in his general proposition, that all beds of navigable rivers are vested in the Crown, it is obvious that the defendants can only claim by virtue of some grant from the Crown; but the defendants have not told us how they claim. The plaintiff says that there is no grant which contains any grant of the soil; the question being as to the right to the soil. The plaintiff says, "Charters have passed between the Crown and the Corporation; but none of them contain any grant of the soil. I do not ask to see the charters; but it is part of my case that they contain no grant of the soil." Is not that part of the plaintiff's case which entitles him to a discovery, in order that when the matter comes to a hearing he may have an admission, if the defendants do not produce any charter, that no charter contains any such grant? It is part of the plaintiff's evidence to prove his case, the absence of any trace of such a grant. This is distinctly within the principle of the cases I have referred to, and quite unconnected with knowing what the evidence for the defence is. Then comes the other part of the first interrogatory, upon which I had more doubt: "and that the defendants may discover and set forth under or by what charter or letters patent or other grant they claim to be entitled to the freehold of the soil." Now that looks like an investigation of the defendants' title; but that is not so, except so far as regards the foundation of it. The defendants will not answer as to the foundation of the title, but say merely, we have been in possession from time immemorial; and we say that you are not entitled. That comes exactly within what Lord Redesdale says, "that the plaintiff is entitled to a discovery of the case upon which the defendant relies, and of the manner in which he intends to support it." If this were construed as a right to see the documents or the evidence, it would clearly be beyond what the rule of the Court would permit, and Lord Redesdale has expressed himself too largely; but taken in the restricted

sense, it is simply, How is it that you claim this property, which the plaintiff asserts to be in the Crown? Though that part of the exception comes near the mark, yet I consider the plaintiff entitled to an answer to a certain extent, because he is entitled to know the grounds and foundation of the defendants' title. The other exception will fall within the same principle, namely, that as to any charter containing a recognition or confirmation of the defendants' title. The fourth exception is "And whether it is true that no sufficient acts of ownership on the part of the mayor, commonalty and citizens or other deeds, matters and things can be shewn as evidence of such immemorial usage." This has immediate reference to the two different positions in which the defendants stand. They are conservators of the river and, as they say, owners of the soil. Certain acts are admitted to have taken place. The question is, whether those acts of ownership are referable to the claim of title or are not to be explained by the controul and dominion which they had as conservators over the river. How is that an investigation of the defendants' title? It may be an idle question, but it does not follow that the corporation are not bound to answer it. The officer of the corporation is made a party, and he may, when he comes to answer it, have to consider whether he can safely say that the acts of ownership are referable to title or are not rather to be referred to the character of the corporation as conservators. The defendants may answer that these acts are to be referred not to title, but to the office of conservators; and if so, a great step would be gained towards establishing the plaintiff's title. The question is, not the probability of getting such an answer, but whether the question, if answered in such a way, would not have that effect. It appears to me that all these exceptions are distinctly within the rule so clearly established. Then comes the last exception which relates to the general inquiry as to the possession of documents. Now, if the defendants have not set up an adverse title, it will be impossible for them to set up the rule for their protection against discovery. I confess that, after having anxiously looked through the papers, I am

inclined to think that there is no title set up in that sense which gives protection to a defendant from discovering matters relating to his title. I must see something stated as a legal foundation for a title before I can accede to a defendant's protecting himself from discovery, by stating as his title that which is, in fact, nothing more than a negation of the plaintiff's title. But it is not necessary to decide this, as there is enough to shew, from the mode in which this question is answered, that the defendants are not entitled to protection. They divide their answer into two parts, and they admit that they are in possession of certain instruments "concerning the title of these defendants to the freehold of the soil, all which several deeds, &c. evidence and shew such right and title of these defendants as aforesaid, all which several deeds, &c. the defendants are advised and believe form material parts of the evidence of the defendants' aforesaid right and title, and all which are intended to be made use of and given in evidence by the defendants in support of their said right and title, and none of which said several charters, &c. do or doth, as these defendants are advised and believe, evidence or tend to shew the alleged right of the Crown; nor would the informant derive any proof in support of his case from the production of such charters, &c. or other documents, or any or either of them." Now, in the first instance, the charge is, that they relate "to the matters aforesaid;" that is, the matters stated in the information. The defendants take upon themselves to say, that they believe that they do not tend to shew the plaintiff's title. Can the defendants be allowed to do that? There is no allegation that they do not relate to the matters aforesaid, nor any description of what they are. If that was to be permitted, a plaintiff would never get a discovery of any documents, because the mere pledging such a belief would leave the plaintiff without any protection against it. Now a case very similar to this is that of *Jerrard v. Saunders* (9). There the party endeavoured to protect himself from discovery of certain deeds by a mere statement that they did not contain any notice; the bill alleging

certain documents and then alleging certain facts amounting to constructive notice. The Court said, We cannot trust you to look at these deeds and say whether they amount to notice or not; you do not deny that they relate to the matters in question; you must state the facts, and the Court will judge whether they amount to notice or not. Now, if the defendants have set out no title, which appears to me to be the result of the pleadings in this case, then it is unnecessary to resort to further authorities for the purpose of seeing whether this last interrogatory ought to be answered or not; and assuming that they have set out a title, they are not entitled to protect themselves from the production of these documents so as to withhold all information as to what documents they are, or whether there are any such at all. I think, therefore, that the Master of the Rolls has come to a right conclusion in allowing this exception.

I do not altogether follow the reasoning of the Master of the Rolls, but the principles on which the discovery ought to be made are so clearly explained in the text books and authorities that there is no occasion to say more on this subject. With respect to the united character of conservancy and ownership it is very difficult to reconcile the fact of these two things existing together in the same persons; and this circumstance entitles the plaintiff to a strict inquiry for the purpose of seeing what acts are to be referred to the one or the other character respectively; for if they are united in the same persons it is obvious that the interests of the public may suffer, because it is the duty of the corporation as conservators to prevent the bed of the river being applied to improper purposes to the prejudice of the public. As owners of the soil they would have an opportunity of doing that which might be very inconsistent with their duty as conservators; and the information charges that if the defendants are owners of the soil, and the Crown has no title in that respect, then there is a remedy against the corporation for an abuse or neglect of their powers and duties as conservators. Upon these grounds I am of opinion that the exceptions were properly allowed and the appeal must be dismissed.

(9) 2 Vea. jun. 187.

Then comes the question of costs. The Master of the Rolls has given costs as in a case between two ordinary parties; but it is said that a rule prevails in practice that the Attorney General neither receives nor pays costs. I think it extremely important that the rule should be well understood; for though the general rule is not disputed, the exceptions to it are so vaguely stated that they may lead to considerable difficulty on particular occasions. Now, the rule whatever it is, is considered as arising from the circumstance that the Crown does not pay, and therefore does not receive costs. Now, without laying down the rule before I have had an opportunity of further consideration, I should say, that the rule might be founded on sound policy, provided the case before the Court were one in which the Crown, if it had been an ordinary suitor, could have been called upon to pay costs; but in no case here could the party respondent be called upon to pay costs, for he has a decision in his favour. It appears, therefore, to me that if the rule is to exist, it ought in justice only to apply to cases where, according to the merits and the result, the costs would be in the breast of the Court either for the plaintiff or the defendant. But that in the case of an appeal where a party is in possession of the judgment of the Court, the rule ought not to be applied, as he could, under no circumstances, be made to pay costs. Before I finally decide this question, I should wish to be furnished with a list of the authorities upon this subject.

Jan. 14, 1850.—The LORD CHANCELLOR.—This case stood over for the purpose of my making inquiries as to the practice with regard to costs where the Attorney General is a party. I find from a variety of cases, that it has been a generally received opinion that the Attorney General neither receives nor pays costs. But that rule is open to a variety of exceptions; and there are many cases to be found in which that rule has not been acted upon; and there does not appear to have been a very general practice on the subject. Two cases in the House of Lords have been referred to as establishing that rule; and if they did establish it, I should have no option

but to follow it. But a distinction must always be taken between the order of the House itself and the reasons given by the member of that House who pronounces that order. The order of the House in two cases, the present case in a former stage, and in a case last session when I was not present, was that there should be costs; but there was no decision laying down the principle upon which the order was so framed, and no reason given why the House adopted that course. On the other hand, I find there are cases in which the House has given the Attorney General his costs. In the case of *The Skinners Company v. the Irish Society* (10), where the Attorney General was a defendant, the bill was dismissed at the Rolls, with costs; and on appeal the House of Lords affirmed the whole of the decree (11). Now, I do not consider myself bound by what passed in the House of Lords in this case upon a former stage when I was present. The case was before the House upon demurrer (12); and my recollection of the case is, that in the course of delivering judgment the fact was suddenly brought to my attention that the Attorney General was a party, and the advice I then gave to the House was, not to give costs in that case. It was done without argument and without due time for consideration; and I think there was error in the advice I then gave to the House of Lords. Now justice requires that the generally received rule as to the Attorney General neither receiving nor paying costs, should not be lost sight of; because nothing could be more unjust than that in a contest in which the Attorney General could not be made to pay costs, he should receive costs; and to obviate the injustice arising to the suitor from the position of the Attorney General coming into court as a party, the Court ought to have the power to say, "As you cannot be called upon to pay costs in a case in which you might be liable to costs as a private party, you shall not receive costs." But then the rule ought not to be extended beyond the reason of the thing; that is, it ought not to be extended beyond

(10) 7 Beav. 642.

(11) 12 Cl. & F. 490.

(12) 1 House of Lords Cases, 440.

the cases in which the Attorney General, assuming him to be a private individual, might be liable to pay costs. The rule, therefore, instead of being that the Attorney General neither receives nor pays costs, ought rather to be, that where the Attorney General, had he been a private individual, might have been called upon to pay costs, there he shall not receive costs. That would apply to the hearing of the cause; for then it depends entirely upon the case then made and the opinion of the Court upon the facts disclosed whether the plaintiff or the defendant is to pay the costs. But where one party is in possession of the judgment of the Court, and the opposite party comes to question that judgment on appeal, then the costs are not a matter for the discretion of the Court; for the party who has got the judgment can never be made to pay costs, for he is entitled to defend his judgment pronounced by a Court of competent jurisdiction, and even though upon the rehearing or appeal the Court may be of opinion that the judgment is not right, he is never made to pay the costs of that contest. The reason of the rule, therefore, does not apply in the case of an appeal against a judgment already pronounced. All this, I admit, goes to shew that the view I took of this case upon the demurrer in the House of Lords was erroneous, for there the parties questioning the decision of the Court below failed. In this case it is very similar; the Master expresses an opinion upon the exceptions; the parties against whom the Master expresses that opinion complain of it; the Master of the Rolls is of opinion that there is no ground for the complaint; and, therefore, he gives his costs to the party upholding the judgment. I have consulted the best authorities upon this subject, and we are all of opinion that it would be a wholesome general rule, that the principle that the Attorney General never receives or pays costs should be modified in this way. The Attorney General never receives costs in a contest in which, if he had been a private party, he might have been called upon to pay them had the decision been adverse. Such a rule would give all the protection to a party opposed to the Attorney General that in justice is due to him, and at the same time discourage unnecessary litigation,

too often arising from the supposed existence of the more extended rule.

I am of opinion, therefore, that the appeal must be dismissed generally, including the question of costs.

WIGRAM, V.C. }
 1850. } SMITH v. CAPRON.
 Nov. 23, 24, 26. }

Specific Performance—Covenant against Assignment—Licence—Notice—Lessor's Title, Production of.

Memorandum of agreement signed by both parties for sale and purchase of fixtures, &c. in a leasehold house, and for purchaser to take an assignment of the vendor's interest in the premises,—Held, to be a contract, on the part of the purchaser, to take an assignment of the lease of the premises.

The purchaser requested the vendor to prepare the assignment by indorsement totidem verbis with that to himself (the vendor):—Held, that the purchaser could not afterwards require the production of the original lessor's title.

The lease contained a covenant against assignment without the licence of the lessors; the purchaser inspected the lease and an indorsement upon it, from which it appeared that a licence was necessary, but he alleged that he did not observe the covenant, and only looked at the term and rent:—Held, that he had notice of the covenant.

The object of the suit and the facts of the case are stated in the report on the demurrer by the defendant to the plaintiff's bill—18 *Law J. Rep.* (N.S.) Chanc. 135. The cause now came on for hearing.

It appeared from admissions in the answer of the defendant, that he had ascertained before the bill was filed the nature of the plaintiff's interest in the property contracted to be assigned, as to the term of years and amount of rent, from an inspection of the lease and assignment produced by the plaintiff for that purpose, and, as the defendant insisted, for that purpose only; but the defendant stated that he did not observe or know of the covenant against assignment without consent contained in the original lease, and that he would not have entered into the treaty

if he had known of such covenant. The defendant in a written reply to the plaintiff's application, for part of the purchase-money before the assignment could be executed, excused himself from then advancing it, but stated that he should be prepared with the purchase-money at the time specified in the agreement. In the same communication the defendant requested the plaintiff to be careful that the walls should not be injured by the removal of the furniture, &c., and added, by way of postscript, the following directions in respect of the assignment:—"As the assignment to me can, of course, be by indorsement and *in totidem verbis* as that to yourself, perhaps you would let your clerk engross it on the deed with a 1*l.* 15*s.* stamp, and for which I can repay you." The assignment was accordingly prepared by the plaintiff. The defendant also admitted his belief of the statement in the bill, that the solicitor of Lord Monteagle (the surviving lessor) had said that a licence to assign to the defendant or other responsible tenant would be granted.

Mr. Wood and *Mr. Southgate*, for the plaintiff, submitted that the defendant had by his acts accepted the title. They relied upon the preparation of the assignment, and contended that the defendant could not afterwards dispute the title or require the plaintiff to produce that of the landlord. They cited *Burroughs v. Oakley* (1) and *Clive v. Beaumont* (2).

The Solicitor General and *Mr. Schomberg*, for the defendant, contended, first, that there was no contract to take an assignment of the lease, but merely an agreement to purchase the fixtures, &c. specified in the written inventory; secondly, that the plaintiff had not shewn that he could obtain a proper licence to assign the leaseholds—*Lloyd v. Crispe* (3) and *Mason v. Corder* (4); and, therefore, his title was defective, and he could not enforce specific performance—*Warren v. Richardson* (5); and, thirdly, that the covenant against assignment was a surprise upon and unknown to him until the bill was filed.

(1) 3 Swanst. 159.

(2) 1 De G. & S. 397.

(3) 5 Taunt. 249.

(4) 7 Ibid. 9.

(5) *Young*, 1.

[*Wigram*, V.C. said, that the memorandum must be considered to be a contract to take an assignment of the lease, and that the defendant could not, under the circumstances, call for the production of the lessor's title.]

Mr. Wood replied, and urged that the defendant having inspected the lease must be deemed to have had notice of the covenant against assignment contained in it. He cited—

Freme v. Wright, 4 Madd. 364.

Cosser v. Collinge, 3 Myl. & K. 283 ;
s. c. 1 Law J. Rep. (N.S.) Chanc. 130.

Pope v. Garland, 4 You. & C. 394 ;
s. c. 10 Law J. Rep. (N.S.) Ex. Eq.
13.

Nov. 26. — *WIGRAM*, V.C.—This is a bill by the assignee of a lease against the defendant who is alleged by the plaintiff to have entered into a contract to take an assignment of the lease. The original lease contains a covenant not to assign without the licence of the landlord. The original lessee obtained a licence enabling him to assign to the plaintiff, and this assignment, expressed to be made with the consent of the lessors, is indorsed upon the lease. The defendant contends, first, that there is no contract; secondly, that, if there is a contract, the plaintiff cannot make a good title; and, thirdly, that the covenant against assignment is a surprise upon him, as he had no notice of it until the bill was filed; and, therefore, that he did not in fact purchase what he supposed himself to be buying. The two former points I disposed of at the conclusion of the argument for the defendant.

It appears that on the treaty between the parties, before the bill was filed, the plaintiff handed the lease with the indorsement, to the defendant, and that the latter then inspected them. A few days afterwards an agreement for the sale of the fixtures and assignment of the plaintiff's interest in the premises was prepared, which was signed by the defendant. The plaintiff required part of the purchase-money to be paid down, which the defendant by a letter, dated the day after the date of the agreement, declined to do, but added, "Of course you may depend upon my being prepared at the time men-

tioned." In the same letter the defendant said, that the terms of the assignment to the plaintiff would be sufficient for that to himself, and requested the assignment to be prepared by the plaintiff and indorsed *totidem verbis*. A dispute afterwards arose which has not any connexion with the defence raised at the bar.

Now, if this case had come before the same Judge (6) who decided *Cosser v. Collinge*, there cannot be any doubt as to what his decision would have been. There might be some hardship if the case was to be determined merely upon constructive notice; but here the defendant saw the indorsement on the lease, and by that indorsement it appeared that licence to assign was necessary. The defendant admits also, that he looked into the body of the lease, and, therefore, he had actual notice of the contents, or at least of such of them as he thought it useful or material to read. The presumption must be, that he made himself acquainted with the whole; and I do not think I ought to allow it to be rebutted by the averment of the defendant, that he looked only at the other parts of the lease, and did not observe the covenant upon which this objection is raised. I may observe, that this covenant, if not strictly an usual covenant, is one so common that there is not any hardship in not regarding it as a surprise upon the defendant.

I must, therefore, declare the plaintiff to be entitled to the specific performance of the agreement, and to a reference to the Master to inquire whether a good title can be made, the title of the lessor to be considered and treated, on the inquiry, as a good title.

WIGRAM, V.C. }
Feb. 13, 16. } JONES v. HOW.

Covenant—Impossible or Useless Act—Covenantor released.

A father, on the marriage of his daughter, covenanted with her intended husband, by deed or will, to give, leave, and bequeath to her an equal share with his, the covenantor's, other children in his real and personal estate at the time of his death. The daughter died in

(6) Lord Cottenham.

her father's lifetime, without issue, after the new Will Act came into operation. The father, by his will, gave all his real and personal property to executors and trustees for the benefit of his surviving widow and daughters, having provided for a son in his lifetime, but not leaving any provision for the deceased daughter:—Held, by this Court (concurring with the certificate of the Court of Common Pleas), that the covenantor, the husband of the deceased daughter, had not, under the circumstances, any good cause of action against the executors of the father, the covenantor; and that if the latter had died possessed of no personal estate, and seised only of copyhold estate, the husband could not have recovered any substantial damages in such action.

The plaintiff, Frederick Jones, on his marriage made a settlement by indenture, dated the 8th of April 1826, on his then intended wife Mary, whose father, William Way, by the same indenture covenanted as follows:—"And this indenture lastly witnesseth, that in consideration of the said intended marriage, and also in consideration of the settlement made by the said F. Jones, he, the said W. Way, for himself, his heirs, executors and administrators, doth hereby covenant, promise, grant, and agree with and to the said F. Jones, his executors, administrators and assigns, that he, the said W. Way, shall and will, by deed or writing, or by his last will and testament, give, leave, and bequeath unto the said Mary Way one full equal eighth part or share, or such other part as shall be an equal share, with all and each of his children and child, of all estates, monies, real and personal estate, of which he the said W. Way shall die seised or possessed."

At the date of the settlement W. Way had eight children living, and two of them subsequently died in the lifetime of the plaintiff's wife, Mary, without issue.

In 1837, the stock in trade, &c. of W. Way and his son, W. W. Way, as maltster was delivered by the former to the latter in consideration of the note of hand of the son for 2,000*l.* with interest at 5*l.* per cent payable to his father for life, and it was agreed that the executors of the father should not call for payment of the note but that the same should be considered a gift to the son.

The plaintiff's wife, Mary, died in February 1843, without issue, leaving her father, W. Way, and his four daughters and son surviving her, and having devised and bequeathed to her husband the plaintiff all her right, title and interest under the covenant.

W. Way died in 1846, and by his will and codicil, dated respectively in April 1843 and November 1844, devised and bequeathed all his real and personal estate to the defendants, in trust to sell and apply the proceeds for the benefit of his wife and four surviving daughters.

After the death of the testator, a bill was filed against the defendants by the plaintiff as administrator, with the will annexed, of the estate of his late wife, Mary. The bill prayed, *inter alia*, for an account of the testator's real and personal estate and of the reversionary shares, settlements, post obits and obligations given by him in his lifetime to his children, and that the plaintiff's share and interest under the covenant might be ascertained, and the same, or the value thereof if converted, conveyed, transferred or paid to him.

The defendants admitted that W. Way had not given any part of his real or personal estate to his daughter Mary, and had not by any deed or writing in his lifetime performed his covenant. They submitted that the covenant was only to take effect in the event of Mary surviving her father, and that as she had died intestate as to her real estate, her interest, if any, in the real estate of her father became vested in him as her heir, and not in the plaintiff; and that the testator's personal estate was insufficient for the payment of his debts.

An objection, that the residuary legatees, the four surviving daughters of W. Way, were not made parties to the suit, having been taken by the defendants and allowed by the Court (1), the bill was amended and framed as a creditors' suit. The plaintiff, by his amended bill, prayed, *inter alia*, for a declaration that he was entitled, under the covenant, to stand as a creditor against the testator's estate for the amount of the largest share therein of his children; for

an account of such shares, and if the defendants should not admit assets, for the usual accounts of the real and personal estate of the testator, and for the application thereof to answer the claim and interest of the plaintiff in a due course of administration.

At the hearing of the cause, the Vice Chancellor directed a case to be sent for the opinion of the Court of Common Pleas on the two following questions: first, whether the plaintiff, under the circumstances, had any good cause of action against the executors of W. Way; and if so, secondly, whether, if W. Way had died possessed of no personal estate, and seised only of copyhold estate, the plaintiff could have recovered any substantial damages in such action.

The Court of Common Pleas returned a certificate to the following effect, viz.: first, that the plaintiff had not any good cause of action; and, secondly, that in the event supposed, he could not have recovered any substantial damages in such action.

Upon the cause coming on to be heard on the equity reserved,—

Mr. Wood and *Mr. Haig*, for the plaintiff, applied for another case to be sent to the Court of Exchequer, upon the grounds that the certificate of the Judges of the Court of Common Pleas was not accompanied by any reasons, and was unsatisfactory to the plaintiff. They stated that the latter Court was understood to have proceeded upon the authority of *Laughter's case* (2), and to have relied upon an argument strongly urged by the defendants' counsel (*Mr. Crompton*), that the words in the covenant to "give, leave, and bequeath," were conjunctive, and only applicable to a will or testamentary instrument; and that as the plaintiff's wife had died in the lifetime of her father, without issue, and since the new Will Act came into operation, it would have been useless for the covenantor to have made a bequest, which, under the circumstances, would have lapsed by virtue of the 25th section of that act (3). It was also argued, that *Laughter's case* was that of a bond on alternative conditions; one of which, through the act of God, it became impos-

(1) 7 Hare, 267; s. c. 17 Law J. Rep. (N.S.) Chanc. 369.

(2) 5 Rep. 21.

(3) 1 Vict. c. 26.

sible to perform. The obligor thereby, and not by any act of his own, lost his election, and he was, therefore, held to be released at law from the performance of the other alternative. Besides, the decision in *Laughter's case* had been commented upon in the subsequent case of *Studholme v. Mandell* (4), and the rule laid down by it said to be incorrectly reported. The present case was that of a covenant, which the covenantor might have performed at any time, and was very similar to the case of *Nayler v. Wetherell* (5). It was laid down as the rule in *Chitty on Contracts*, p. 735, that a covenant must be construed strictly against the covenantor, even where prevented by the act of God—*Tuffnell v. Constable* (6).

Mr. Haldane (with whom was *The Solicitor General*) distinguished the present case from that of *Nayler v. Wetherell*. In the latter case the words were "by will or otherwise," in the present case they were "by deed, writing, or will." He asked for the costs of the suit, as the cause came on to be heard upon the equity reserved at the former hearing, and was a creditors' suit by one creditor on behalf of himself only, and who had no debt at law.

Feb. 16.—WIGRAM, V.C.—In this cause, I directed a case for the opinion of the Court of Common Pleas upon the construction of a covenant which had become the subject of litigation between the parties. By this covenant (I will assume this construction as being most favourable to the covenantee,) the covenantor bound himself by some act *inter vivos*, or by will, to leave his daughter, the wife of the covenantee, a certain provision. No act, *inter vivos*, was done by the covenantor, nor did his will contain any provision for her. She died in his lifetime, without issue. The circumstance that the covenantor made no provision by his will for his daughter was, I understand, considered to be immaterial, upon the ground that any provision for her by will would have lapsed by her death without issue in the lifetime of the covenantor. The case

was argued before three of the Judges, and they have certified that there had been no breach of covenant by the covenantor entitling the covenantee to recover damages against his estate. The question before me now is, whether I shall confirm that certificate or send a case for the opinion of another Court.

The practice of this Court in such cases I understand to be, to adopt the certificate unless the Court itself is dissatisfied with the conclusion involved in the certificate. In this case I am not assisted by knowing the reasons of the Judges of the Court of Common Pleas; but I understand from counsel that they considered the case by analogy to the reasoning of the Court in *Laughter's case*. The covenantor in this case reserved to himself the privilege of not making the stipulated provision during his life; and the provision by will, it is said, has failed, not by his act or default, but by the death of the legatee in his lifetime. There cannot, I think, be any doubt that the intention of the parties is disappointed by this decision. Where a parent on the marriage of his child covenants to make a provision for that child by deed or will, it cannot be doubted that the provision is intended to be absolute, and that the mode of making it is alone intended to be left to the discretion of the covenantor. A doubt crossed my mind of this nature: if the will of the covenantor had contained a provision in favour of this daughter, and she had left issue living at her death, the new Will Act would have prevented a lapse; and a doubt occurred to me whether the covenantor might not have made a will so as to have preserved to his daughter the benefit of this covenant, notwithstanding her death in his lifetime. Whether, in fact, he might not by will have done for her dying without issue that which the Will Act would have done for her if she had left issue living at her death. I do not know whether this point was suggested in argument before the Court of Common Pleas; but I do not feel such confidence in the point as to make it proper to send the case a second time to law. I shall therefore confirm the certificate, and must dismiss the bill, with costs.

(4) 1 Ld. Raym. 279; s. c. 1 Lutw. 688.

(5) 4 Sim. 114; s. c. 9 Law J. Rep. Chanc. 125.

(6) 7 Ad. & E. 798; s. c. 3 Nev. & P. 47; 7 Law J. Rep. (N.S.) Q.B. 106.

V.C. }
March 11. } SCARTH v. CHADWICK.

Practice—Dismissal of Bill—Motion.

Bill filed by a plaintiff on behalf of himself and all other the shareholders in a company, praying that the defendants, the directors of the company, might be ordered to repay to the shareholders all sums which might appear to have been improperly paid by them out of the funds of the company. The defendants moved to dismiss upon payment to the plaintiff of the sum claimed by him, together with his costs:—Held, that the plaintiff having complete dominion over the suit, and being the only person with whom the defendants could deal, they were entitled to dismiss upon the proposed terms.

This was a bill filed by Henry Scarth, on behalf of himself and all the other subscribers to and shareholders in a partnership or company called "the Madrid and Valencia Railway Company," except the defendants, the directors of the company, praying that the defendants might be ordered to repay to the shareholders all monies which should appear, upon taking the accounts of the partnership, to have been improperly paid by the said defendants out of the funds of the company, and that the plaintiff and the other shareholders might be declared liable to contribute such proportions of the expenses properly incurred as the Court should declare to be due and owing from them, and that the residue of the deposits might be repaid to the plaintiff and the other subscribers to the undertaking.

The bill alleged that the plaintiff was the holder of eighty shares in the company, and that he had paid the sum of 160*l.* by way of deposit upon such shares; that the number of shareholders was so great and their interests so various that the plaintiff was unable to make them all parties to the bill, and that in fact the plaintiff was ignorant of the names and addresses of such shareholders. The bill also alleged that the defendants had improperly managed the affairs of the company, and had made a profit by dealing with the shares.

Mr. Bethell, Mr. Rolt, and Mr. Glassey now moved, on behalf of several of the

defendants, that on payment by them to the plaintiff of the sum of 160*l.*, being the full amount claimed by him for deposits upon his shares, together with his costs of the suit and the costs of the other defendants, all further proceedings in the suit might be stayed.

Mr. Malins and Mr. Welford opposed the motion, on behalf of the plaintiff, and contended that, as the plaintiff was suing on behalf of himself and all the other shareholders in the company who were in the same situation as himself, the proceedings in the suit could not be stayed by the mere payment of the plaintiff's claims, and that the defendants were bound to account for what they had received.

Mr. Bacon appeared for other defendants.

The VICE CHANCELLOR.—As I understand the case, the plaintiff has filed his bill in such a manner as to become the *dominus litis*; and there is nothing upon the face of the bill to shew that he has not full power to dismiss the bill himself. The bill alleges that the shareholders are so numerous that it would be impossible for the plaintiff to make them all parties, and that, in fact, the plaintiff is ignorant of their names and addresses. The last reason makes it perhaps unnecessary to consider the first; but this is evident, that the plaintiff has complete dominion over the suit, although it might possibly turn out for the advantage of other persons besides himself. Upon the face of the bill, however, the plaintiff is the only person with whom the defendants can deal; and I do not see any reason why the defendants should not move to dismiss.

Motion granted.

V.C. }
March 21. } THE CORPORATION OF LIVERPOOL v. CHIPPENDALE.

Practice—Insufficiency of three Answers—Fourth Answer taken off the File.

The defendant, having filed three answers, which were reported insufficient, filed a fourth answer before the certificate of the insufficiency of the third answer was ob-

tained. A motion by the plaintiff, under the 10th Order of 1828, to have the fourth answer taken off the file, was granted.

This was a motion on behalf of the plaintiffs that the answer of the defendant might be taken off the file, on the ground that it was the fourth answer after the three first had been reported insufficient. The bill stated that the defendant had commenced an action at law against the plaintiffs, to recover a sum of 2,000*l.* for rent alleged to be due to the defendant from the plaintiffs. The bill was filed in aid of the defence to the action, and the defendant had put in three answers, all of which were reported insufficient. The defendant then put in a fourth answer, which was filed by the Clerk of Records and Writs without his being aware that the three previous answers had been found insufficient.

Mr. Bethell and *Mr. Follett*, in support of the motion, relied on the 10th Order of April 1828 (1), which provides "that upon a *third* answer being reported insufficient, the defendant shall be examined upon interrogatories to the points reported insufficient, and shall stand committed until such defendant shall have perfectly answered such interrogatories; and shall pay, in addition to the 4*l.* costs heretofore paid, such further costs as the Court shall think fit to award."

The following cases were cited—

Russell v. Dight, 6 Sim. 430; s. c. 3 Law J. Rep. (N.S.) Chanc. 152.

Ingham v. Ingham, 9 Sim. 363.

Mr. Stuart and *Mr. Lewin* opposed the motion, on the ground that the fourth answer was filed before the certificate of the insufficiency of the third answer had been filed. The object of the plaintiffs was to stop the action at law, and to move to stay trial for default of answer. It was the right of the defendant, under such circumstances, to put in his answer up to the last moment, to prevent the plaintiffs from stopping the action. A complete discovery had now been given by the defen-

dant's fourth answer, and the Order did not prohibit the filing of a fourth answer; but it gave the plaintiff leave to examine the defendant upon interrogatories to the points reported insufficient. The defendant was to stand committed until he should have answered such interrogatories, but it gave no power to the Court to order the fourth answer to be taken off the file.

The following authorities were cited:—

Wynne v. Jackson, 2 Sim. & Stu. 226.

Rushton v. Troughton, 2 Sim. 33.

Farquharson v. Balfour, Jac. 587.

The VICE CHANCELLOR, without hearing a reply, said—This appears to me to be the simplest point. I have more than once had occasion to make observations on the paper of *Mr. Beames* relating to these Orders, which explains the whole thing, and if attention had been paid to what is stated in pages 105 and 106, it would have been plain that the 10th Order of 1828 was framed in pursuance of what was thought right, that the 16th proposition of the Commissioners should be adopted, having regard to the explanatory paper. It will be seen from the report of the Chancery Commissioners that what is stated by Lord Eldon as the practice, was in fact a mistake, if I may make such an observation with the greatest respect for Lord Eldon, and that what his Lordship thought was the practice of the Court, was in fact a departure from the Order made in 1700, and which order, it was the object of the Chancery Commissioners to revive; and since the Order of 1828, it is clear that it is not competent for the defendant to file a fourth answer; my opinion is, that the conclusion is irresistible from the documents to which I have referred, and since that Order no one has ever thought of holding a contrary doctrine; therefore, upon the simple question, that the defendant, after a third answer has been reported insufficient, has thought fit to put in a fourth answer, my opinion is, that such a course is not allowed by the practice of the Court; and the motion must be granted.

(1) Ord. Can. 7.

V.C. }
March 1. } *In re LILLEY'S DEVISEES.*

Railway Company—Petition—Costs—Unnecessary Length.

Upon petition for the investment of money paid in under a railway act, it was objected that the petition was made unnecessarily long by the introduction of certain clauses in the railway acts, which, being public acts, were sufficiently known to the Court, and that the costs of such petition ought not to be allowed:—Held, that the introduction of the railway clauses was not unnecessary, and the petitioner was entitled to the costs.

This was a petition for a reference to the Master to approve of a proper investment of certain money paid into court by the London and North-Western Railway Company upon the purchase of land.

Mr. Miller appeared in support of the petition.

Mr. Rousell, on behalf of the company, objected to the payment of the costs incurred by this petition, on the ground that it was made unnecessarily long by the introduction of various sections in the Lands Clauses Consolidation Act and the London and North-Western Railway Company's Act, which, being public acts, were sufficiently known to the Court.

The VICE CHANCELLOR.—This question has several times been raised before me. In one case, which related to certain acts of parliament, concerning the parish of Woolwich, I considered the petition improper, because it set forth in seven or eight instances the facts relating to the several tenements, all in precisely the same terms, when the circumstances affecting one tenement would have been sufficient. Another case came before me where the petition first stated the facts which constituted the case, and then the Master's report was set out fully, which recited over again the very same matters that had been previously stated. There, also, I considered the petition improper: but here it is altogether different. There is upon this petition a reference to certain public

acts under which the Court is called upon to make the order, and the sections relating to the matter are set out. It cannot be supposed that the Court is to carry about a voluminous library, or to recollect all the acts of parliament that have been passed. It appears to me that all those matters should be stated upon which the Court is called upon to act; and I do not think that the present objection can be maintained, where the petition only sets forth the acts under which the Court is to form an opinion. I am aware that this subject is liable to much abuse, but it does not appear to me that this is a case in which the costs can be refused.

V.C. }
March 15. } *In re THE LEEDS AND THIRSK RAILWAY COMPANY, Ex parte THE RECTOR OF KIRKBY OVERBLOW.*

Railway Company—Petition—Service.

Certain glebe lands belonging to the rectory of Kirkby Overblow having been taken by a railway company, and the money paid into court, a petition was presented by the rector for investment of the money:—Held, that it was not necessary to serve the company with notice of the petition.

In this case it appeared that the Leeds and Thirsk Railway Company had purchased certain glebe lands belonging to the rectory of Kirkby Overblow, and the purchase-money had been paid into court to an account entitled as above. A petition was now presented by the rector for the investment of the money in other lands, but the railway company had not been served with the petition.

Mr. Elmsley appeared in support of the petition, and suggested to the Court whether it was necessary that the railway company should be served.

The VICE CHANCELLOR made the order, notwithstanding the company had not been served.

V.C. }
May 27, 31. } ASHBURNER v. WILSON.

Devise—Construction.

A testator devised his estates to trustees, to pay the rents equally between his nephew James Wilson and other nephews and nieces for life, and upon the decease of the survivor he devised all his said estates "to a son of James Wilson in marriage, his heirs, and assigns." All the tenants for life died. James Wilson had two sons by his first marriage, who died infants and unmarried, and a third son by a second marriage, who survived:—Held, that the devise was to the first son of James Wilson in fee simple, and his heirs were consequently entitled.

A question was raised in this case as to the construction of the will of James Ashburner, dated the 1st of April 1794, by which the testator devised certain freehold estates to trustees, to divide the rents into five equal parts, and to pay one-fifth part to his nephew Thomas Campbell, for life, one-fifth equally between his nephews Isaac and James, for their lives; one-fifth to his niece Jane Wilson, for life; one-fifth to his sister Susannah Starkey, for life; and one-fifth to his sister Elizabeth Ashburner and her children, if she should marry and have any, for their lives: the share of each of them dying to go to the survivors or survivor, and on the death of the last survivor the testator devised all his said estates to a son of his sister Elizabeth Ashburner, if she should marry and have a son, his heirs and assigns, and for want of such issue, to a son of his niece Margaret Starkey, if she should marry and have a son, his heirs and assigns; and for want of such issue, to a son of his nephew James Wilson in marriage, his heirs and assigns; and for want of such issue, to a son of his nephew Isaac Wilson in marriage, his heirs and assigns; and for want of such issue to a son of his niece Jane Wilson, if she should marry and have a son, his heirs and assigns; and for want of such issue, to a son of his nephew Thomas Campbell in marriage, his heirs and assigns.

The testator died in 1794, and all the tenants for life died, James Wilson being

the last survivor. Elizabeth Ashburner died without issue; Margaret Starkey died, leaving one daughter; James Wilson died, having had two sons by his first marriage, who died infants and unmarried, and a third son, the plaintiff, James Ashburner Wilson, by a second marriage; Isaac Wilson died without issue; Jane Wilson died without issue; and Thomas Campbell died, leaving one son.

The question now raised was, to whom the fee simple of the estates descended, upon the death of the tenants for life.

Mr. Bethell, Mr. J. Russell, and Mr. Milne, for James Ashburner Wilson, the last tenant for life, contended that the effect of the devise to the son of James Wilson in marriage, his heirs and assigns, was to give an estate for life to James Wilson, with remainder to his first and other sons, so that James Wilson would be tenant in tail. The following cases were cited in support of this argument:—

King v. Melling, Vent. 214, 225.

Robinson v. Robinson, 1 Burr. 38; 2 Ves. sen. 225.

Mellish v. Mellish, 2 B. & C. 520; s. c. 2 Law J. Rep. K.B. 45.

Seaward v. Willock, 5 East, 198.

Mr. Malins and Mr. Tripp, for one of the co-heiresses of the eldest son of James Wilson, contended that this was a devise to the eldest son of James Wilson, in fee.—The word "son" could not be considered as *nomen collectivum*, since the words "his heirs and assigns" were added. The words used here were clearly words of purchase. *Barnardiston v. Carter* (1), *Right d. Shortridge v. Creber* (2). It was also contended, that the devise was not void for uncertainty; and the following authority was cited:—*Powell v. Davies* (3).

Mr. Lloyd and Mr. Phillips appeared for another co-heiress of the eldest son of James Wilson.

Mr. J. Parker and Mr. Bates, for the heirs-at-law of the testator, contended that the will was void for uncertainty.

(1) 3 Bro. P.C. 64.

(2) 5 B. & C. 866; s. c. 4 Law J. Rep. K.B. 324.

(3) 1 Beav. 532.

Mr. Stuart and Mr. Elderton appeared for the trustees of the will.

May 31.—The VICE CHANCELLOR.—This is one of the most singular wills I have ever seen. The precise meaning of the testator does not very clearly appear; for one cannot help being struck with the difference of language used in the devises to sons of males and sons of females; but the only question is the effect of the devise "to a son of my nephew James Wilson, in marriage, his heirs and assigns," and my opinion is, that the only construction to be put upon those words is, that the first son of James Wilson took a fee simple in the estates, and therefore that those persons are now entitled who may be the heirs-at-law of such first son. It appears to me to be a very fair thing to have brought this question before the Court for decision.

K. BRUCE, V.C. } BEARCLIFFE v. DOR-
June 3. } RINGTON.

Priority—Notice—Stop Order—Judge's Order under 1 & 2 Vict. c. 110.

A testator devised his real and personal estate to trustees on trusts for sale, and directed them to pay a share of the produce to A, and a suit was instituted for the administration of his estate. By a deed, dated in December 1844, A. assigned this share to B. to secure certain advances, and B. immediately gave notice of the assignment to the trustees. By an order made in the cause in June 1845, it was ordered that the real estates of the testator should be sold, and the produce paid into court and invested; and a sum of stock, in respect of the purchase-money, was afterwards carried to the credit of the cause. In April 1846, C. obtained judgment against A, and by a Judge's order the stock was ordered to stand charged with the amount for which judgment was obtained. The order was filed in the Accountant General's office in November 1848, at which time no other order had been filed:—Held, that C. had not priority over B.

A testator devised and bequeathed all his real and personal estate to Benjamin

Doubleday and Thomas Pegrum on the usual trusts for conversion, and directed them, out of the proceeds, to pay Mary Dorrington 20*l.* a-year for her life, and to divide the residue between her five children, of whom T. P. Dorrington was one.

This suit was instituted for the administration of the estate of the testator, and the sum of 72*l.* was, in the suit, carried over to the separate account of T. P. Dorrington.

Three petitions, which were presented in this suit by claimants on this fund, now came on to be heard, the question discussed being one of priorities.

The dates of the instruments under which the claims were made were as follows:—

By deeds dated in June 1837 and October 1838, T. P. Dorrington assigned his interests under the will to Benjamin Doubleday, the trustee, to secure certain advances exceeding 72*l.*

By deeds dated December 1844 and October 1845, T. P. Dorrington assigned his interests under the will to Mr. Satchwell, to secure certain advances exceeding 72*l.* Notice of these deeds was given to Doubleday and Pegrum, the trustees of the will, immediately after their execution.

These were the subjects of the first two petitions. There being some question, however, whether, by reason of certain representations made to Mr. Satchwell by Mr. Doubleday, the mortgages made to Mr. Satchwell had not priority over those previously made, an agreement was made by the petitioners in the first two petitions that they should divide the fund.

Mr. Jenkins, the petitioner in the third petition, obtained judgment against T. P. Dorrington on the 27th of April 1846 for 389*l.* The judgment was registered, as directed by the act, on the same day. By a Judge's order, dated the 10th of November 1848, made in pursuance of the 1 & 2 Vict. c. 110. and the 3 & 4 Vict. c. 82, it was ordered that one-fifth part of the sum of 877*l.* 1*7s.* 7*d.* 3 per cent. annuities, standing in the name of the Accountant General of the Court of Chancery to the credit of the cause of *Bearcliffe v. Dorrington*, and also one-fifth part of a sum of 126*l.* 5*s.* 7*d.* cash in the hands of the Accountant

General in trust in the cause, should, subject to the payment thereof of costs, stand charged with the payment of the sum of 389*l.*, being the amount of the judgment, &c. This order was filed in the office of the Accountant General on the 14th of November 1848. On that day no order had been filed by any person claiming to be an incumbrancer on the fund.

The dates of the proceedings in the suit of *Bearcliffe v. Dorrington* were as follows.

By an order dated in June 1839, the usual references and inquiries were directed.

By an order dated the 25th of June 1845, it was ordered that a small balance due from the executors should be paid into court, and that the real estates of the testator should be sold, and that the purchase-money should be paid into court and invested.

The estates were sold, and in pursuance of the order, and in respect of the purchase money, the sum of 877*l.* 17*s.* 7*d.* 3 per cent. consols, and a sum of cash were carried to the credit of the cause generally.

In August 1847 Mary Dorrington, the annuitant, died.

By an order dated the 13th of July 1849, it was ordered that 877*l.* 17*s.* 7*d.* 3 per cent. consols, standing to the credit of the cause, should be sold, and that, out of the produce and the cash standing to the credit of the cause, the costs should be paid, and that one-fifth part of the residue should be carried over to an account, to be entitled the account of the said defendant T. P. Dorrington and his incumbrancers, subject to the further order of the Court, and not to be dealt with without sufficient notice to the petitioners.

The three petitions now came on to be heard.

Mr. Swanston and *Mr. W. T. S. Daniel*, for the petitioner, *Mr. Jenkins*, contended that, as he had been the first person to assert his right on the fund in court, he was entitled to T. P. Dorrington's share in priority to the other claimants, and cited—

Greening v. Beckford, 5 Sim. 195.

Etty v. Bridges, 2 You. & C. C. C. 486; s. c. 12 Law J. Rep. (N.S.) Chanc. 474.

Swayne v. Swayne, 11 Beav. 463.

Mr. Welford, for the other petitioners.

KNIGHT BRUCE, V. C. said that he thought that the Judge's order did not give *Mr. Jenkins* a priority over *Mr. Satchwell* because *Mr. Satchwell* did not obtain a stop order, and that the claims on the fund ought to rank according to their dates.

LORDS COM. July 2, 4, 15.	{	<i>In re KOLLMANN'S RAIL- WAY LOCOMOTIVE AND CARRIAGE IMPROVE- MENT COMPANY, ex parte Beresford.</i>
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Company—Winding-up Act—Contributory—Agreement to take Shares—Forfeiture.

Shares in a proposed company, to be carried on under a deed of settlement, were allotted to A. upon his application, in respect of which he paid various instalments both before and after the date of the deed; but he never executed the deed, and, in consequence, his shares were declared forfeited, and were carried to the company's share account. A. submitted to the forfeiture, and some years afterwards the affairs of the company were wound up under the Joint-Stock Companies Winding-up Acts:—Held, affirming the order below, that A. not having executed the deed was not strictly a shareholder, but being merely connected with the company by contract it was competent to the parties to put an end to the contract by mutual agreement; and this having been done, A. was properly excluded from the list of contributories.

This was an application, by way of appeal from a decision of the Vice Chancellor Knight Bruce, refusing a motion by the official manager, that the name of *Francis Marcus Beresford* might be restored to the list of contributories to the company. The company was established by a deed of settlement, dated the 18th of March 1845. Previously to the date of the deed, namely, in July 1844, five shares of 20*l.* each were allotted to *Mr. Beresford* upon his application; and on the 7th of August *Mr. Beresford* paid a deposit of 2*l.* per share, and on the 9th of February 1845 he paid a further deposit of 3*l.* per share; and on

the 3rd of June 1845 a further deposit of 3*l.* per share; making in all an instalment of 40*l.* on the five shares allotted to him. Mr. Beresford never executed the deed; and by a resolution of the board of directors, on the 19th of August 1845 (notice of which was given to Mr. Beresford), it was resolved that Mr. Beresford should be informed that if he did not sign the deed of settlement previously to the 25th inst. his shares should be forfeited under clause 105 of the deed. Mr. Beresford having taken no notice of this resolution, on the 26th of August 1845, at a meeting of the board, it was resolved that Mr. Beresford's five shares be forfeited in consequence of his not having signed the deed of settlement. Both these resolutions were entered in the minute-books of the company; and the five shares so forfeited were subsequently transferred to the company's share list.

The 105th clause of the deed of settlement is set out in the report of the hearing in the court below—*ante*, p. 166.

Mr. Bacon and *Mr. Glaspe*, for the official manager.—The directors had no power to declare Mr. Beresford's shares forfeited under the 105th clause, as his name was not in the schedule to the deed; and the declaration of forfeiture, if valid, would not relieve him from his previous liabilities. His shares have never been transferred in the mode pointed out by the deed, and therefore the act of the directors is not binding on the company—*In re the Vale of Neath Brewery Company, ex parte Morgan* (1).

Mr. Daniel, for Mr. Beresford, contra.—The respondent is not a shareholder in the company, but merely a person who has proposed to take shares and has never carried his proposal into execution. The directors have declared his rights forfeited, and the respondent has acquiesced in that declaration—*Walford v. Adie* (2). No company was formed at the time the respondent agreed to take shares, and he is not liable to the creditors of the company or to the shareholders. The conditions of subscription have never been fulfilled, and the project has never been carried into effect.

(1) 1 Hall & T. 593; s. c. 18 Law J. Rep. (N.S.) Chanc. 265.

(2) 5 Hare, 112.

In re The Universal Salvage Company, Lord Mansfield's case, 3 De Gex & Sm. 58; s. c. 1 Hall & T. 593; *ante*, p. 258.

Fox v. Clifton, 6 Bing. 776; s. c. 8 Law J. Rep. C.P. 257.

Pitchford v. Davis, 5 Mee. & W. 2; s. c. 8 Law J. Rep. (N.S.) Exch. 157.

Nockells v. Crosby, 3 B. & C. 814.

Walstab v. Spottiswoode, 15 Mee. & W. 501; s. c. 15 Law J. Rep. (N.S.) Exch. 193.

Wontner v. Shairp, 4 Rail. Cas. 542; s. c. 17 Law J. Rep. (N.S.) C.P. 38.

Bell v. Lord Mexborough, 5 Rail. Cas. 149; s. c. 17 Law J. Rep. (N.S.) Chanc. 296.

Mr. Bacon, in reply.—In *Lord Mansfield's case* the Lord Chancellor held, that a person by taking shares had rendered himself liable as a contributory to some extent at least, though the company was never fully formed or the project carried out according to the prospectus; as did also the Vice Chancellor Knight Bruce, in *Parbury's case*, *In re The Direct London and Exeter Railway Company* (3).

July 15.—ROLFE, B. LORD COMMISSIONER, delivered the judgment of the Court.—This was a company which was established by a deed of settlement of the 18th of March 1845. Previously to the date of the deed, Mr. Beresford agreed to take five shares of 20*l.* each, and he paid various instalments on his shares, amounting in all to 40*l.*, part before and part after the date of the deed; but he never executed the deed, though often called on so to do. Till he had executed the deed he certainly was not a member of the company; though by his contract he might have made himself subject to all or some of its liabilities. There was a clause in the deed authorizing the directors to declare forfeited the shares of any of the parties named in the schedule thereto who should not execute the deed before the 18th of April 1845. In fact, there was no schedule to the deed; but on the 19th of August 1845 the directors passed a resolution, that if Mr. Beresford did not execute the deed on or before the

(3) 3 De Gex & Sm. 43.

25th instant his shares should be forfeited. This resolution was communicated to Mr. Beresford, and, he having made default, the directors, on the 26th, declared his shares forfeited, and they were carried to the credit of the company. In this arrangement Mr. Beresford and the company acquiesced; and under these circumstances the Master held, that he was not a contributory, and the Vice Chancellor Knight Bruce came to the same conclusion, and we think rightly.

The argument before us, in support of the application to discharge the order of the Vice Chancellor and to put Mr. Beresford's name on the list, turned mainly on this, that he had once been a holder of shares and had never got rid of the liabilities arising therefrom; and we were pressed with the well-established doctrine that where a joint-stock company is trading under a deed, there the shares can only be forfeited or transferred in the mode pointed out by the deed. But that doctrine is not applicable to a case like the present, where the party, holding what are inaccurately called shares, has never executed the deed so as to be a shareholder in the strict sense of the term. Mr. Beresford had a right to become, and perhaps might have been compelled to become strictly a shareholder. Until, however, he had invested himself with that character, he was merely connected with the company by contract; and it was competent to the parties to that contract, Mr. Beresford on the one hand and the directors on the other, by mutual agreement, to put an end to that contract and the relations arising out of it on certain terms; and that being done, all further connexion between them ceased. According to the terms of the arrangement, for so the transaction may be more accurately described than by the term "forfeiture," though so designated by the parties, Mr. Beresford, on the 26th of August 1845, ceased to have any claim upon or to be under any liability to the company. We are of opinion that this, which was the view of the case taken by the Master and by the Vice Chancellor, was the correct one; and this motion, therefore, must be refused, with costs.

LORDS COM. }
July 11, 15. } FORSYTH v. ELLICE.

*Witness—Examination de bene esse—
Time of Publication—Inquiry before the
Master—Items of Account.*

The evidence of a witness, taken de bene esse before the cause was at issue, was not published before the hearing. After a decree, directing certain accounts, an application (supported by affidavits that the witness had become insane and that his evidence related solely to items of accounts) that such evidence might be published for the purpose of being used before the Master on the question of accounts, was refused; overruling the order of the Court below.

This suit was instituted to recover the plaintiffs' share of the property and effects of the late partnership of Sir Alexander M'Kenzie & Co., of Canada. The original bill was filed in June 1837, and amended at various times, and the final answer was put in in 1843. Replication was filed on the 16th of April 1844, and in the July following witnesses were examined. On the 9th of May 1842, the plaintiffs obtained an order for the examination *de bene esse* of Charles Tait, a witness residing at Montreal, Canada. The affidavits upon which the order was obtained were, first, an affidavit by the plaintiffs that they were informed and believed that Charles Tait, of Montreal, was a very material witness on their behalf in the causes, and that without his evidence they could not safely proceed to a hearing therein; that he was the only witness to some of the facts and circumstances connected with the matters in question in the cause, and which they were advised were material and necessary to be proved therein: and by an affidavit of the plaintiffs' solicitor, that he had been informed and believed that the entries in the books of partnership of Sir A. M'Kenzie & Co. touching the transactions mentioned in the pleadings, or many of them were made by C. Tait, and various accounts relating to the same matters, were also made out by him, and deponent had been informed and believed that C. Tait was the only witness who

could prove the correctness of the said entries, and the accounts so made out by him. In July 1844, publication passed in the regular way; but no application was made to publish the evidence of Charles Tait taken *de bene esse*. On the 11th of July 1845, a decree was made directing certain accounts to be taken. On the 26th of February 1850, a motion was made before Vice Chancellor Wigram, that the depositions of Charles Tait might be published, and that the same might be read before the Master to whom the causes were referred. This motion was supported by the affidavit of a surgeon, made in December 1846, stating that he had an interview with Charles Tait, in December 1846, at Montreal, and that his memory and judgment were so impaired as to render him incompetent to give legal evidence in any court of justice; and also by the affidavit of Robert Cowie, who stated that one Thomas Thain left Canada in 1826, and that after his departure the books of account referred to were kept or made up by Charles Tait, who was the only person who (but for the unsoundness of his mind) could give evidence of the accounts, and of the errors and corrections existing in such accounts, and by the affidavit of Francis Ommaney, who stated that in proceeding to take the accounts, the Master had called on the plaintiffs to produce evidence relating to or explanatory of contested items of account between the plaintiffs and the defendants, and that he believed that Charles Tait was, and had been for some years of unsound mind, and was the only person who (but for his insanity) would have been able to give such evidence; and also by an affidavit of the plaintiffs' solicitor, who stated that, when the causes were at issue, he was advised that it was not necessary or proper then to enter into evidence relating to contested items of account between the plaintiffs and the defendants; and that evidence as to items of account should not be entered into unless such evidence should be required in taking the accounts before the Master. The Vice Chancellor was of opinion that, upon satisfactory evidence of the witness's insanity, the plaintiffs were entitled to have the depositions taken *de bene esse*, published, and

to use the same on the question of accounts in the Master's office, on the ground that until the time had arrived when it was necessary that the witness should be examined, it could scarcely be proper to publish depositions taken *de bene esse*; and his Honour expressed himself as having no doubt but that a witness might be examined *de bene esse* after decree in aid of inquiries referred to the Master, if from age, illness, or other cause there were danger of his evidence being lost; and the motion was ordered to stand over, with liberty to the plaintiffs to give further evidence as to the witness's state of mind, to ascertain whether he were then capable of being examined in the usual way.

The defendant, Ellice, now moved to discharge that order, and that the motion for the publication of the depositions might be refused.

The Solicitor General and *Mr. Brett*, in support of the motion, insisted that it was contrary to the practice of the Court to allow the evidence of a witness taken *de bene esse* before the hearing, to be published five years after the decree in the cause—*Fitzpatrick v. Webb* (1).

Mr. Roundell Palmer and *Mr. Dickinson*, in support of the order below.—In *Smith v. Althus* (2) evidence not read at the hearing was allowed to be read before the Master. The evidence of Tait could not have been used at the hearing, even if it had been published, as it relates to items of account—*Law v. Hunter* (3); nor ought it to be entered on the decree—*Tomlin v. Tomlin* (4). The evidence was taken to be used whenever in the progress of the cause it might become necessary.

July 15.—LORD LANGDALE now delivered the judgment of the Court.—The question is, whether under the circumstances here stated, the motion ought not to have been refused. The Vice Chancellor considered that, if it had been proved that the

(1) 2 Moll. 313.

(2) 11 Ves. 564.

(3) 1 Russ. 100.

(4) 1 Hare, 241, n.

witness was insane at the time when the motion was made, the depositions ought to have been published.

There can be no doubt that, according to the general rule, depositions taken *de bene esse* in a cause are not to be published in cases where the witness might have been, and was not examined. Not, however, construing the words "might have been" so strictly as to make it absolutely necessary that an examination or an endeavour to examine the witness should be made at the earliest possible moment of the period during which the examination might or ought to have been made; but the proper period for examination is between the time when the cause is at issue and the time when publication passes; and if during this period the witness whose depositions *de bene esse* it is desired to publish might have been and was not examined, publication of depositions taken *de bene esse* has not in any case been allowed. All general rules may, however, be liable to some exceptions in a special case.

A special reason for not examining the witness in this case is stated to be, that according to two cases before Lord Gifford, witnesses ought not to be examined before the hearing as to disputed items of account.

Without repeating observations which have often been made on those cases, there is no doubt that in a case where the right or liability to account, and the general authenticity of books and accounts (and not particular items) were alone in question, it would be improper to examine witnesses upon particular items of account, and not specially charged to be erroneous in the pleadings. In this case it is not stated in the pleadings, and in the affidavits it does not appear, that particular items were charged to be erroneous, or that the intention was to examine the witnesses concerning particular items of account. The witness, as appears by the affidavits, was intended to prove the correctness of the entries made by him in the books, and in the accounts made out by him. He might, therefore, under the order have been properly examined to the fact, whether the entries which he had made in the books

and accounts were correct, but he could not have been properly examined for the purpose of proving errors, or special facts not charged in relation to particular items of the account, and depositions taken upon particular items of account (of the impeachment of which the other parties had no notice) could not, as it seems to us, be read against them.

The opposition to the motion was also supported by reference to the case of *Smith v. Allhus*, in which it was correctly stated by Lord Eldon, "that where the Court directs an inquiry into a fact, it is in the nature of a new issue joined"; but that issue arises out of facts charged or alleged in the cause, and the trial of it proceeds in a regular manner, the examination of witnesses in the Master's office being founded on facts specially charged. If, in this case, it were held that upon the accounts to be taken in the Master's office the issues were new as assumed in the argument, and that the witness examined *de bene esse* was not examined on facts in any way appearing to be put in issue at the time when he was examined, the other parties, who could not be aware of the subject of the examination, might be exposed to the greatest injustice.

We cannot think this merely a question of strict practice. Various occasions occur in which the examination of witnesses *de bene esse* is absolutely necessary for the due administration of justice, and if the examination be properly conducted, the depositions, though not taken under all the sanctions which are desirable, must under proper circumstances be read and used; but the rule that the party obtaining such depositions must, if he have the opportunity, examine the witness in a regular manner, and with all the sanctions thought necessary in other cases, is also of great importance, and in this case we do not think that the special circumstances warrant any departure from the general rule. It, therefore, appears to us that the order complained of must be discharged.

L.C.
1849. } REID v. LANGLOIS.
Dec. 19, 20. }

Production of Documents — Privilege — Communications with a Solicitor through a third Party—Joint Interest of a Defendant with an absent Party.

A. brought an action of trover against R. & Co. to recover the value of a ship which had been lost at sea, and in respect of which R. & Co. had received the insurance-money. R. & Co. then filed their bill against A. and his partner, to restrain the action, and for an account, charging that the ship was the property of A. and his partner, and claiming a lien upon the insurance-moneys in respect of balances of account due to them from the partnership. A, by his answer, admitted the possession of certain documents, but stated that they belonged not to himself alone, but to himself and his partner, and were in his possession for the benefit of himself and partner. A motion upon the answer of A. for the production of these documents was refused.

A defendant, residing at Quebec, by his answer admitted the possession of letters which had been sent by him "to his agent" for the purpose of being communicated to his solicitors, and which had reference to the suit:—Held, that these communications were privileged.

On a motion for the production of documents, it is not sufficient for the plaintiff to read detached insulated passages from the answer admitting possession, but he must take the whole case as it is stated in the answer.

The bill in this case, which was filed on the 9th of November 1848, stated that the plaintiffs carried on the business of merchants at Liverpool and in London, under the firm of Reid, Irving & Co., and that the defendants Peter Langlois the elder and Peter Langlois the younger, from a period prior to 1845, up to the time of their stopping payment in September 1847, carried on the business of merchants and ship-owners in partnership together at Quebec, in Canada, under the firm of Peter Langlois & Son; that the plaintiffs during 1847 acted as the agents of the defendants Langlois & Son; that in May 1847 the defendants having purchased a British

vessel called the *European*, sent the said vessel on a voyage to Liverpool, consigned to the care of the plaintiffs, and at the same time informed them that such vessel belonged to the said Messrs. Langlois & Son, and they instructed the plaintiffs to effect an insurance of the vessel, and also to effect an insurance of the goods to be shipped in her, and to have the vessel re-classed, and sent upon another voyage; that the plaintiffs upon the arrival of the vessel at Liverpool caused her to be surveyed, and ascertained that before she could be sent upon another voyage it would be necessary to cause very extensive repairs to be done to her, the expense whereof was ultimately estimated at between 1,000*l.* and 1,300*l.*; that such repairs were accordingly effected, and the costs, together with the premiums of assurance and the plaintiffs' commission, amounted in the whole to 1,997*l.*; that the plaintiffs also accepted various bills of exchange drawn upon them by Messrs. Langlois & Son, amounting, in the whole, to 13,000*l.* and upwards, and that such bills were accepted in reliance upon the lien to which the plaintiffs were entitled upon the said vessel and freight, and upon divers goods assigned to the plaintiffs by Messrs. Langlois & Son, and upon other goods assigned to them in other ships; that the said Messrs. Langlois & Son stopped payment in September 1847, at which time the monies which the plaintiffs had paid on their account exceeded the amount and value of the goods and property in the hands of the plaintiffs on account of the Messrs. Langlois & Son, exclusively of the said vessel called the *European*, by the sum of 5,000*l.* and upwards; that upon Messrs. Langlois & Son having stopped payment, the defendant John Jones claimed to be entitled to the *European*, alleging that he had ever since 1846 been owner of one-half thereof, and that the said Peter Langlois the younger had transferred the same vessel to him with power of sale, for the purpose of securing certain advances alleged to have been made by him; that the said Messrs. Langlois & Son countenanced the said claim of John Jones, and alleged that the vessel belonged to Peter Langlois the younger, subject to the interest therein of the said John Jones; that the *European* remained in Liverpool in the power of the

plaintiffs until December 1847, when they effected an insurance of her for 6,800*l.*, and sent her on a voyage to the Clyde, where she encountered a violent storm and was lost; that the money received by the plaintiffs from the insurance of the vessel amounted, in the whole, to 6,457*l.*; that the plaintiffs handed over to the agent of J. Jones the sum of 1,683*l.*, part of the said insurance-money, to be held by him until the right to the same should have been established by the said J. Jones as mortgagee of the said vessel, and retained the rest of the amount to satisfy their own claims; that in April 1847 an action of trover was brought against the plaintiffs in the name of Peter Langlois the younger, for the recovery of the value of the said vessel.

The bill charged that, although the plaintiffs had discovered that the vessel was, in fact, registered in the name of Peter Langlois the younger alone, yet that the said Messrs. Langlois & Son always up to the time of their stopping payment represented to the plaintiffs that the same vessel belonged to the partnership firm of Messrs. Langlois & Son; that various letters had been addressed to the plaintiffs by the firm in which this statement did in effect appear, as they invariably spoke with the plural "we" of what they wished done with the vessel; and that the defendants had in their possession letters and documents which, if produced, would prove the same.

The bill prayed an account of the transactions between the plaintiffs and the defendants, and a declaration that the plaintiffs were entitled to a lien upon the vessel in respect of the balance due to them; and that such balance might be paid out of the money received from the insurance of the vessel; and it also prayed an injunction to restrain the said action at law commenced against the plaintiffs by the said P. Langlois the younger.

The first answer of the defendant P. Langlois the younger, was put in on the 15th of May 1849, alleging that the vessel called the *European* had been purchased by himself, and was registered in his own name; and that the power of attorney sent to the plaintiffs with the vessel, authorizing them to take the necessary steps with regard to her, was signed by him alone,

and that consequently the vessel was not liable to the debts of the firm; and that the firm merely acted as the agents of the defendant in consigning the vessel to the plaintiffs. The answer then set forth various schedules of documents relating to the matters in question, in the possession or power of the defendant; and stated that the documents mentioned in the first part of the schedule related not only to the matters in question in the cause, but to other matters not connected with the suit; that the letters mentioned in the second part of the schedule were confidential communications which had passed between the defendant, or his agents on his behalf, and his solicitors and legal advisers, and between the solicitors and legal advisers of the defendant, after the matters in dispute in the cause had arisen and in reference thereto, and he submitted that the same were privileged and ought not to be produced; and that the documents contained in the first and second parts of the schedule belonged to the late firm of Langlois & Son, and were in the possession not only of the defendant, but also of the said P. Langlois the elder, as one of the late members of the said firm.

Two of the letters for which privilege was claimed by the answer were entered in the schedule as follows:—"Two letters from the defendant to Robinson & Brooking, the agents of this defendant in England, dated the 30th of August 1848 and the 5th of July 1848, to be communicated by the said Messrs. Robinson & Brooking to the said Messrs. W. & M., the legal advisers of this defendant in England." A third letter was set out in the same schedule as "A letter from defendant to Robinson & Brooking, dated the 1st of February 1849."

The defendant P. Langlois the younger, in his further answer and answer to the amended bill, stated that the documents mentioned in the first and third parts of the schedule to his former answer were formerly in the possession of the firm of Langlois & Son, and after the 31st of January 1848 (when that partnership was dissolved) till the 31st of May 1849, were in the possession of P. Langlois the elder jointly with the defendant; and since the 31st of May 1849 had been and then were in the possession of J. R. Langlois, the

defendant's brother, and the defendant; that the defendant and the said J. R. Langlois were bound to produce the said last-mentioned documents, as and when they might be required so to do by P. Langlois the elder; and that such last-mentioned documents and each of them were and was still in the power of P. Langlois the elder; and the defendant denied that any of the documents which were formerly in the possession of P. Langlois & Son were then in the possession or power of the defendant alone.

The plaintiffs having obtained the common injunction moved before the Vice Chancellor of England for the production of the documents contained in the first, second, third and fourth schedules to the defendant P. Langlois the younger's answers; and that the time for shewing cause against dissolving the injunction might be extended until after their production; when his Honour made an order for the production of all the documents, with the exception of a case and the opinion of counsel thereon, and enlarged the time for shewing cause against the injunction till the third seal after such documents were produced.

The defendant now appealed against that order.

Mr. Stuart and *Mr. Cotton*, for the appeal.—No order can be made for the production of the documents described in the first and third parts of the schedule; for the answer states that those documents are in the joint possession of the defendant and another party, who is interested therein, and is not before the Court—*Taylor v. Rundell* (1), *Murray v. Walter* (2); for the defendant cannot, without the consent of the absent party, comply with the order of the Court. Secondly, the letters contained in the second part of the schedule were confidential communications passing between the defendant and his agents and his professional advisers, with reference to this litigation—*Bunbury v. Bunbury* (3). Thirdly, the ship *European* was registered in the name of the defendant alone, and

such registry is conclusive evidence both at law and in equity of the ownership—*Camden v. Anderson* (4), *Ex parte Yallop* (5). The plaintiffs were in no way deceived as to the ownership; for the power of attorney to the plaintiffs to deal with the ship was given by the defendant, P. Langlois the younger, alone. The documents themselves, if produced, can in no way assist the defendant at law in the trial; and the dates of the proceedings shew that the only object of the application is delay.

Mr. Bethell and *Mr. Goldsmith*, contra.—The documents, of which the production is required, are the documents of the defendant's agents; and the possession of the agent is the possession of the principal. The rule as to confidential communications being privileged extends only so far as the necessities of mankind require; the letters written by the defendant to his agents, Messrs. Robinson & Brooking, who were not his professional advisers, are not within the protection. If a man sends a letter to A.B. with directions to give it to his solicitor, that letter is protected; but not so where A.B. is only directed to communicate the contents, but remains himself the depository of the letter.

Steele v. Stewart, 1 Phil. 471; s. c. 14

Law J. Rep. (N.S.) Chanc. 34.

Maden v. Veevers, 7 Beav. 489.

Kerr v. Gillespie, Ibid. 572.

Mr. Stuart replied.

Dec. 20.—The LORD CHANCELLOR.—This case appears to me to turn entirely upon the meaning of, and the construction to be put upon, certain sentences in the answer with reference to a well-established rule of practice in this court. The motion is to produce certain documents, alleged by the plaintiffs and admitted by the defendant, to be in his possession. An action of trover was brought by the defendant; the bill was filed, and the usual order made to extend the injunction to stay trial upon the answer coming in. Certain exceptions were taken to the answer; and upon the order *nisi* to shew cause why the injunction

(1) Cr. & Ph. 104; s. c. 13 Law J. Rep. (N.S.) Chanc. 20.

(2) Cr. & Ph. 114.

(3) 2 Beav. 173; s. c. 9 Law J. Rep. (N.S.) Chanc. 1.

(4) 5 Term Rep. 709.

(5) 15 Ves. 60.

should not be dissolved, the Vice Chancellor of England made an order, by which he ordered the production of certain documents appearing in the schedule to the answer of May 1849, and adjourned the consideration of the order *nisi* for dissolving the injunction until those documents were produced. Now, the documents in question, which are in the schedule to the answer, are of two descriptions: the first consists of those which are described in the first schedule,—certain journals, cash-books, &c. marked respectively, A, B, C, and D. Now, the case made by the defendant, who is desirous of dissolving the injunction, is this: that he was partner with his father, carrying on business at Quebec, and that they had correspondence with Reid, Irving & Co. of Liverpool, in the course of which mutual accounts arose; that the ship *European* was consigned to them, with instructions, in a certain event, to sell or otherwise to deal with or manage it, as the plaintiffs allege, on account of the house in Quebec. The defendant, who has brought the action of trover, says, that the ship was his alone; and he has brought this action for the purpose of recovering damages for the conversion of the ship, which had been lost in a voyage to Glasgow, where it had been ordered by Reid & Co., who had received the insurance-moneys paid in respect of the same. All that is immaterial to the right and title at law to the ship. In equity, if there be an equity to be raised on the title to a ship, a question which I do not enter upon, as not necessary for the purpose of disposing of the present motion, it is entirely open to the plaintiffs, without regard to the legal ownership. If the defendant was the legal owner, and recovered in the action, they may have an equity attaching on the ship totally unaffected by the legal ownership. I say nothing now upon the difficulty of attaching such an equity upon a ship. The defendant, however, resists the production of the documents in the first part of the schedule, on this ground: he says, "I was partner with my father; we carried on business together; these documents were documents belonging to that house, and did not belong to me exclusively; and you are now asking an order against me, individually, to produce them. I say, I have

no power to produce them; they are in my possession, but for myself and partner." It is true that the answer admits that after a certain period the partnership ceased; but there was no bankruptcy or insolvency, and therefore no transfer of the interest of the father to any other person. Whether the business was carried on or not, the property not having passed to other persons, that, which was joint property or property in common at the time the business ceased, remains, if not converted into separate property, just as it was when the partnership business ceased. It is as much in the possession of the two partners now as it was before, nothing being alleged to have happened subsequently by which the state of the property was changed.

On that statement in the answer, certain detached passages have been read where the word "possession" was used; but it is quite clear that you cannot read a single insulated passage on a motion to produce documents or to pay money into court. To find out what the defendant means you must take the whole case as it is stated; and it is certain from the whole answer that what the defendant means by "possession" is not a legal possession, but an actual possession. In the common use of the language that is a possession; but when you are speaking of possession for the purposes of production you mean, not an actual corporeal possession merely, but a legal possession, where the party is authorized to deal with the subject-matter. I have no hesitation in saying, that the defendant in his answer states that his father is in the joint legal possession with himself of these documents; and therefore they are not under his direction or controul, not being in his sole legal possession. The authorities, then, are perfectly clear upon this point: that where the documents are not in the exclusive possession of the defendant, but in the possession of some one else jointly with him, there you cannot order the production. *Murray v. Walter* and *Taylor v. Rundell* are quite conclusive upon that point. Those cases recognize that as the well-established rule, and it cannot now be disputed. It appears to me, therefore, quite clear that, as to the first part of the schedule, production

cannot be ordered in the present state of the pleadings. If any subsequent arrangement could be shewn by which the documents became the exclusive property of the defendant, it cannot be read upon this application. Whether any amendment of the bill may produce discovery for that purpose it will be for the plaintiffs to consider. But another argument is used which seems to me to raise the most extraordinary conclusion. It is said that the defendant admits that he employed this house as his agents; and if the documents are in the hands of his agents, he is bound to produce them. It is very true that if a document is admitted by a defendant to be in the hands of his agent, he is bound to produce it; because it is then in his own possession, for he has the controul over it in the hands of his agent, and it is as much in his own possession as if it were in the hands of a servant. That is the only rule established by the cases referred to, namely, that if a transaction to which the bill relates has been transacted by an agent, the plaintiff has a right to call for the documents of the agent. Now, no two things can depend on more different rules. Here there are no documents belonging to the defendant, his own exclusive property, in his own hands or in the hands of his agent. The documents in question belong to the house, that house being employed by him as agents; but you cannot as against the house get those documents without having all the parties here, and shewing an equity against them. That the defendant was a partner in the agency house is not disputed. The plaintiffs may have an equity against the defendant individually; but inasmuch as this defendant says, these documents are not in my exclusive possession, but in the legal possession of myself and another, you have no right to have them produced as against the party who is jointly interested with him; and the defendant, if ordered to produce them, has no power to perform the order of the Court. According, therefore, to the ordinary rule, upon the case as it now stands in the answer, the defendant is protected by the allegation in the answer of a joint interest of another person in the documents in question, and by a denial of

the exclusive legal possession being in himself.

Now, with regard to the second point, the privileged communications. The first two documents which are in dispute, are entered in the schedule in this way; as documents which passed between the legal advisers of the defendant and the defendant himself or his agents.—[His Lordship here read the statement in the answer as to the two letters of the 30th of August and 5th of July 1848.]—The answer, therefore, contains a distinct statement, that all the documents here stated consist of communications between the defendant or his agents and his legal advisers; and the statement in the schedule is, that these two letters were sent to the agents for the purpose of being communicated to the legal advisers. Now, the argument was this: that though I may have a communication with my legal adviser, and documents arising out of that will be protected, yet if I send a message in writing through a third person, that is not protected. There certainly is no sense in that distinction. The object of the rule is to protect the party taking the advice of a professional man, and he may be debarred altogether from taking such advice if he is in danger of having all his communications disclosed when he is entering into a contest with his opponent. The common sense of the thing would be quite sufficient authority for the point; but it has been decided long ago, not as a new rule, but as a matter of recognized decision—*Walker v. Wildman* (6) and *Bunbury v. Bunbury*. But it is said the necessity for it must exist. Though the Master of the Rolls, in the last case, says, a necessity must exist, he nowhere limits the rule to the actual necessity arising; but he uses it for the purpose of shewing that there must be such a protection. One of these documents, however (the letter of the 1st of February 1849), as to which it is admitted there is some error, is said not to be protected, because there is nothing in it to shew that it had anything to do with the legal adviser. With that exception, the other documents contained in the second part of the schedule, taking the schedule

and the answer together, are letters or communications passing between the defendant and the defendant's agents and the legal advisers of the defendant, and are therefore privileged.

Being of that opinion, therefore, it appears to me that there is no sufficient ground for the order pronounced in the Court below. But it was said that the Vice Chancellor's decision proceeded upon the ground that there were certain errors in the schedule and certain papers which cannot be protected. One I have already alluded to. Whether there was an error in describing it in the schedule or in putting it in at all does not appear. The schedule certainly does not describe it in terms to bring it within the protection; but that, without any ground for imputing wilful falsehood to the defendant, is not a reason for rejecting altogether the defendant's oath; and such a proposition seems to me to be the reverse of all those rules on which the Court acts when it calls upon the plaintiff in these cases to shew his title from the answer. The plaintiffs must take the whole answer together, and must shew their title from the answer. It is not sufficient to say, that the answer is loosely worded, therefore the oath of the defendant is not binding; and, therefore, you must reject it altogether. If the plaintiffs move upon the answer, they must take the answer as the defendant has stated it. Inaccuracy or want of care in preparing the schedule ought not to conclude the party, and it is impossible that that should give to the plaintiffs the right which they would not otherwise have had to another subject-matter.

These grounds, therefore, have all failed; but if that were not so, I should feel extreme difficulty in giving the plaintiffs time by postponing the trial of this action. The action of trover was commenced in April 1848; from that time the plaintiffs in equity knew what they had to contend with. The bill, however, was not filed till November 1848; and the answer upon which they are now moving was obtained in May 1849. Unless parties who are seeking a discovery in defence of an action are to wait till that action is at the point of trial, and then ask the Court to

postpone it, this delay is not to be accounted for. This is quite conclusive on the present application; and the Vice Chancellor's order, therefore, must be discharged to the extent I have stated, leaving the parties to proceed as they may be advised on the order *nisi*.

No costs were given, either of the original hearing or of the appeal.

K. BRUCE, V.C. } THE EARL OF LONSDALE
May 22. } v. BECKETT.

Trustees—Appointment of New Trustees.

A testator appointed A, B, and C. to be trustees of his will, and declared that, if the trustees thereby appointed or any of them should happen to die, it should be lawful for the surviving trustees or trustee to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying; and that, on such appointment, the trust premises should be conveyed, so that the same should be vested in the surviving trustees and such new trustees, or in such new trustees solely, on the same trusts. A. died in the lifetime of the testator:—Held, that it was the intention of the testator that there should be three trustees of his will, and that a new trustee might be appointed in the place of A.

William, Earl of Lonsdale, by his will, dated the 29th of June 1836, devised the real estates therein mentioned to John, Earl of Westmoreland, Sir John Lowther, and Sir John Beckett, their heirs and assigns, upon certain trusts therein contained. The will contained the following proviso as to the appointment of new trustees:—

“ Provided always, and I hereby declare my will and mind to be that, if the trustees hereby appointed or to be appointed as hereinafter is mentioned, or any of them shall happen to die, or be desirous of being discharged of and from, or refuse, or decline, or become incapable to act in the trusts hereby reposed in them as aforesaid before the said trusts shall be fully executed, then and so often as the same shall happen, it

shall and may be lawful to and for the surviving and continuing trustee or trustees, or the executors or administrators of such last surviving or continuing trustee, by any deed or deeds, writing or writings under their, his or her hands and seals, or hand and seal, and to be attested by two or more credible witnesses, from time to time to nominate, substitute and appoint any other person or persons to be a trustee or trustees in the stead or place of the trustee or trustees so dying, or desiring to be discharged, or refusing, or declining, or becoming incapable to act as aforesaid, either solely or jointly with the other trustee or trustees, and thereupon all and singular the aforesaid trust estates and premises shall be, with all convenient speed, conveyed, assigned, and transferred in such manner as that the same shall and may be legally and effectually vested in the surviving or continuing trustees or trustee of the same trust estates, monies, or premises, and such new or other trustee or trustees, or, if there shall be no continuing trustee or trustees, then in such new trustees only, upon the same trusts as are hereinbefore declared of and concerning the same trust estates, monies, and premises respectively, or of such of them as shall be then subsisting and capable of taking effect; and that every such new trustee shall and may act or assist in the management or execution of the trusts to which he shall be so appointed as fully and effectually, and with the same powers and authorities, to all intents and purposes, as if he had been originally nominated a trustee of this my will." •

William, Earl of Lonsdale, died on the 19th of March 1844. John, Earl of Westmoreland, died in the lifetime of the testator, and Sir John Lowther died shortly after the testator.

The trusts of the will were administered by Sir John Beckett alone, from the death of the said testator until his own death.

By an indenture, dated the 22nd of May 1847, under the hand and seal of the said Sir John Beckett, and attested by two witnesses, Sir John Beckett, after declaring that he was desirous of being discharged from the trusts reposed in him by the will of the testator, in pursuance of such desire

and in exercise of the power, &c. appointed William Beckett, Esq. to be a trustee in the place of him the said Sir John Beckett for all the trusts and purposes, &c. of the will, so far as the same were then subsisting, undetermined, and capable of taking effect.

No conveyance of the trust estates was executed by Sir John Beckett.

Sir J. Beckett, by his will, devised all his trust estates to Sir Thomas Beckett and Lady Ann Beckett, and appointed them executors, and died in 1847.

The bill, which was filed by some of the *cestuis que trust* under the will of William, Earl of Lonsdale, prayed that it might be declared, that the deed-poll of the 22nd of May 1847 did not operate as a valid or effectual appointment of William Beckett to be a trustee of the said testator's said will in the place of Sir John Beckett deceased, and that it might be declared that two new trustees of the said will, and not any greater or other number of trustees, ought now to be appointed, and that, in any case, the defendants, Lady Ann Beckett and Sir Thomas Beckett respectively might be decreed and directed to appoint or concur in appointing such number as the Court might think ought to be appointed of new trustees of the testator's will; or that, if necessary, such number of new trustees as ought now to be appointed might be appointed by the Court.

Mr. Malins and *Mr. Wickens*, for the plaintiffs, stated that, under the peculiar circumstances of this trust, it would be a matter of great inconvenience to the parties interested under the will, if it should be held that three trustees were necessary, and that it was very desirable for them that there should be two only. They then contended that, as one of the trustees had died in the lifetime of the testator, it must be considered that his name had been, in effect, struck out of the will, and that the testator had appointed only Sir John Beckett and Sir William Lowther to be trustees, and declared that their places only should be supplied, so that, in fact, under the will and the circumstances which had happened, the proper number of trustees to administer to the will was

two—*Walsh v. Gladstone* (1), *Winter v. Rudge* (2). They also contended that a greater or a less number of trustees might be appointed in the place of the original number—*Corrie v. Byrom* (3).

Mr. R. Palmer and *Mr. Bentinck*, for other parties.

KNIGHT BRUCE, V.C. said that, in the way in which he read the will, he must think that it was the intention of the testator to appoint three trustees, and that that intention ought to be attended to. There was nothing in the will leading to a different conclusion, and there was one expression in favour of it, that is, in the event of there being no continuing trustees the estates were to be vested in the new trustees only. On this, however, he did not lay much stress. He was unable to decide that the power had been duly exercised by Sir J. Beckett. With the greatest respect for other judicial opinions, if pressed to decide, he must say that he thought the intention of the testator was that there were to be three trustees.

An order was made by which it was declared that the appointment made by Sir J. Beckett was invalid; and it was referred to the Master to appoint new trustees, and state whether it would be for the benefit of the parties that there should be only two new trustees.

K. BRUCE, V.C. }
May 30. } HAIG v. GRAY.

Practice—Demurrer—Time for answering—Jurisdiction of the Master.

A demurrer put in to a bill was overruled at the hearing, and the Court gave the defendant a month's time to answer:—Held, that the Master, in such a case, had not jurisdiction to give further time for answering.

A demurrer put in to the bill in this suit came on to be heard, and was overruled.

- (1) 14 Sim. 2.
- (2) 15 Sim. 596.
- (3) Hill on Trustees, 610.

At the same time the Court granted the defendant a month to answer the bill. Shortly before the expiration of the month, the defendant applied to the Master for further time, and obtained an order for a month, "to answer, plead, or demur, not demurring alone." A motion was now made to discharge this order, for irregularity.

Mr. Haig, for the motion, contended that the Master had not jurisdiction in such a case as that before the Court to grant leave for further time to answer.

Mr. Lee and *Mr. F. S. Williams*, for the defendant, contended that the Master had jurisdiction. They referred to 3 & 4 Will. 4. c. 94. s. 13, whereby it was enacted that the Master should determine all applications for time to answer, &c., and all other matters relating to the conduct of suits as the Lord Chancellor should, by general orders, direct; and cited—*Trim v. Baker* (1), *Biedermann v. Seymour* (2), and *Hunter v. Nockolds* (3).

KNIGHT BRUCE, V.C. said that it was a rule of practice that a second demurrer could not be put in to a bill without the leave of the Court, after the first demurrer had been overruled. The order, then, giving leave to demur would be irregular. The form of the order, however, in this respect might easily be altered, and he would not at once decide the question on that ground. The motion must stand over until he could ascertain the opinion of the Master of the Rolls.

On a subsequent part of the day,—

KNIGHT BRUCE, V.C. said he had received a communication from the Master of the Rolls, who thought that, as the Court had once dealt with the question, the Master had no jurisdiction. With that opinion he concurred. The motion must, therefore, be granted.

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- (1) Turn. & R. 253.
 - (2) 2 Myl. & Cr. 117; s. c. 6 Law J. Rep. (N.S.) Chanc. 152.
 - (3) 2 Phill. 540; s. c. 17 Law J. Rep. (N.S.) Chanc. 253.

L.C. } THE GRAND JUNCTION CANAL
Feb. 4, 6. } COMPANY v. DIMES.

Jurisdiction—Interest of the Lord Chancellor as a quasi co-Plaintiff in the Subject-matter of the Suit—Motion to discharge the Order made.

By a decree of the Vice Chancellor of England, made in a suit by an incorporated company against the defendant, claiming an interest in lands taken by the company, a perpetual injunction was granted; and this decree was affirmed, on appeal, by the Lord Chancellor. A motion, by the defendant, that the order for the injunction might be discharged, or in the alternative, that the bill might be taken off the file, on the ground that the Lord Chancellor was a shareholder in the company, was refused, with costs.

This was an application by the defendant Dimes, that an order of the Vice Chancellor of England, of the 10th of December 1849, under which Dimes had been committed to the Queen's Prison for breach of an injunction, might be discharged or varied; and also that a notice of motion, dated the 24th of February 1849, and still pending, might be finally disposed of, and an order made pursuant to the terms thereof; or that an order of the Vice Chancellor of England of the 2nd of June 1849, refusing a motion then made by Dimes, might be discharged; or that the bill in this cause might be taken off the file, with costs to be paid by the company; or that all further proceedings might be stayed. The application was heard by the Lord Chancellor, assisted by the Master of the Rolls.

In 1793 the company were incorporated by a local act of parliament, and thereby empowered to purchase lands for the purposes of their canal. In March 1797 the company purchased of Joseph Skidmore, a copyhold tenant of the manor of Rickmansworth, certain copyhold lands of the said manor, for the sum of 308*l.* 10*s.*; and on the 13th of March in the same year, J. Skidmore, by deed-poll, conveyed to the company all his interest in the lands so purchased, and executed a bond to indemnify the company against all rents and

services which might be claimed by the lord. Shortly afterwards the company took possession of the lands so purchased, and made their canal and towing-path through the same. No surrender of the premises was ever made, or any agreement for purchase of the rights of the lord of the manor. At the date of the deed-poll H. F. Whitfield was seised of the manor in fee; and in 1831 the same became vested in Dimes in fee. In May 1835 J. Skidmore died, leaving T. E. Skidmore, an infant, his customary heir; and no person having claimed to be admitted to the premises on his death, Dimes, after the usual proclamations in the manor-courts, issued a warrant for seizing them into his own hands as lord of the manor; and in June 1838 he brought an ejectment against the plaintiffs in the Queen's Bench, and obtained a verdict in his favour. In June 1838 the present bill was filed by the company, insisting that they were not bound to purchase the interest of the lord, but that they had a right to require Dimes to admit T. E. Skidmore or some other person on their behalf; that they had applied to Dimes to admit their trustee, and had offered to pay him the proper fines and fees upon such admission, but that Dimes had refused to comply with such request, and threatened to obstruct the navigation of the canal. The bill prayed that Dimes might be decreed to admit either the plaintiffs or T. E. Skidmore, or such other person as the plaintiffs should appoint; the plaintiffs submitting, if necessary, to purchase all the interest of the lord in the premises, and that Dimes might be restrained from obstructing the navigation of the canal. By an order of the 26th of July 1838, the *ex parte* injunction, which had been granted by the Vice Chancellor of England immediately after the filing of the bill, was continued to the hearing; and on the 15th of December 1838 a motion by way of appeal to the Lord Chancellor to dissolve that injunction was refused; and on the 6th of July 1839 a writ of injunction was issued, and on the hearing in 1846 the injunction was made perpetual, and a decree was made that T. E. Skidmore, as heir of J. Skidmore, ought to be admitted tenant; and that he, when admitted, would

be a trustee for the plaintiffs.—15 *Sim.* 402; s. c. 16 *Law J. Rep.* (N.S.) Chanc. 148.—In January 1848, on appeal by Dimes to the Lord Chancellor, that judgment was affirmed—17 *Law J. Rep.* (N.S.) Chanc. 206.

It appeared also, that in 1840 Dimes brought an action of trespass for mesne profits against the company, and ultimately obtained a decision in his favour—9 *Q.B. Rep.* 469; s. c. 16 *Law J. Rep.* (N.S.) Q.B. 107.—At the hearing of this case, on a writ of error, in the Exchequer Chamber, Alderson, B., who was one of the Judges present, stated that he was a shareholder in the company, and the hearing was therefore postponed until the next sitting of the Court, when Alderson, B. was not present.

After the decision of the Lord Chancellor, in January 1848, Dimes, for the first time, learned that his Lordship was a shareholder in the company. His Lordship held, in fact, ninety-two shares in the company, seventeen in his own right and seventy-five in a fiduciary character, in some of which last he also had a beneficial interest. Dimes thereupon presented a petition to the Queen, praying that Her Majesty would cause such directions to be given for the hearing and determination in the Court of Chancery of the defendant's petition of rehearing and appeal, and so far as might be necessary, of that petition, as Her Majesty should be advised were in accordance with right and justice towards the defendant and the other parties. This petition was not proceeded with; but, on the 24th of February, Dimes gave a notice of motion that the order made by the Lord Chancellor in January 1848 might be discharged, and that the petition of appeal might be amended; and that proper directions might be given by the Court, by the issuing a commission or otherwise, as might be necessary, for the hearing and determination of the said petition of appeal before the Master of the Rolls, assisted by two Judges of the courts of common law. This motion was heard, before the Master of the Rolls, at the request of the Lord Chancellor, in May 1849, when the Master of the Rolls stated that he should advise the Lord Chancellor that the motion ought to be refused, with

costs (1). This was the motion which the present application sought to have disposed of; and this was done by the Lord Chancellor directing an order to be drawn up in accordance with the advice of the Master of the Rolls.

In 1849 Dimes commenced several actions of trespass against the company, with a view of testing the validity of these several orders; and the Vice Chancellor of England, on a motion to commit the defendant Dimes for breach of the injunction, or restrain him from continuing the actions, was of opinion that nothing had been as yet done which amounted to a breach of the injunction, but he made an order to restrain Dimes from proceeding with the actions.—18 *Law J. Rep.* (N.S.) Chanc. 419.—A cross-motion was made by Dimes to take the bill off the file for irregularity, which was refused; and this was the order of the 2nd of June 1849, which the present motion sought to discharge.

In November 1849, Dimes threw a chain across the canal and cut through the towing path so as to obstruct the navigation, and upon motion, the Vice Chancellor of England made an order, of the 10th of December 1849, for his committal.

On the 11th of January 1850, Dimes was arrested under that order, and handed over to the keeper of the Queen's Prison.

On the 14th of January 1850, Dimes applied to the Queen's Bench for a *habeas corpus*, which was issued; but, as the return to that writ was that the defendant was detained by virtue of a writ founded upon an order of the Vice Chancellor of England, the question as to the validity of the Lord Chancellor's order could not be raised, and consequently the Court held that no ground was shewn for the defendant's discharge.—19 *Law J. Rep.* (N.S.) Q.B. 158.

Mr. Daniel and *Mr. Smythies*, in support of the motion.—This application is founded upon two grounds: first, that any undisclosed pecuniary interest in the subject-matter of dispute creates a personal incapacity in a Judge to hear and deter-

(1) 18 *Law J. Rep.* (N.S.) Chanc. 365.

mine any question relating to the matters in contest in such suit; secondly, as a consequence, any proceeding so had, as against the party to whose prejudice it is taken, is *coram non iudice*, and any order made in such proceedings, *in invitum*, is void. The rule holds in the case of a plurality of Judges as well as in the case of a single Judge; and in the latter case a remedy is provided in Chancery by another form of proceeding. The application of the rule cannot depend upon the discretion of the Judge. The rule is for the protection of the Judge as well as of the suitor—*Roll. Abr. tit. 'Judges' (A.) pl. 11, Lord Derby's case (2), The Chancellor of Oxford's case, (3)*. In the case of *Great Charte v. Kennington (4)*, it was held that a magistrate who was possessed of real estate in a particular parish could not join in an order for the removal of a pauper from that parish, because he had an interest in diminishing the rates; and the 16 Geo. 2. c. 18. was passed to remove the difficulty arising from the application of the principle to that particular case. In an *Anonymous case (5)*, "The mayor of Hereford was laid by the heels for sitting in judgment in a cause where he himself was the lessor of the plaintiff in ejectment, though he, by the charter, was sole Judge of the court"—*Brookes v. Earl of Rivers (6), The King v. the Inhabitants of Yarpole (7), The Queen v. the Commissioners for Paving the Town of Cheltenham (8)*. In *The Queen v. the Justices of Hertfordshire (9)*, it was laid down, that if any one of the magistrates be a party interested in the question, the decision is invalidated, even though there were a majority of magistrates in favour of the order, excluding the one who was interested. Under the Lands Clauses Consolidation Act, (8 Vict. c. 18. s. 39,) where the sheriff is interested in the question as to the value of the lands taken by a railway

company, his jurisdiction is taken away and the coroner substituted. In *Esdale v. Lund (10)*, it was held that a shareholder in a joint-stock banking company was an unfit person to be a juror in a cause in which the interests of the bank were affected—*The Queen v. the Inhabitants of Upton St. Leonards (11)*. In *Lord Mostyn v. Spencer (12)* the depositions were suppressed on the ground of an undisclosed interest in one of the Commissioners, even though the witnesses were dead, and the damage therefore irreparable. If the rule is applied with such strictness to inferior officers, *à fortiori* will it apply to the Lord Chancellor. Before Lord Denman's Act, (6 & 7 Vict. c. 85,) the Lord Chancellor could not have been called as a witness in this case, and yet it is said he may nevertheless exercise a jurisdiction to restrain the defendant from his legal rights established by a verdict at law in his favour. The order of the Lord Chancellor in this case has a direct effect upon the value of the shares, and the exercise of the jurisdiction in the present case is an infringement of that principle of the law of England which has hitherto been so jealously adhered to for the sake of securing the administration of justice from the possible imputation of partiality.

But, admitting the principle, it was said that the application of it to the present case would have amounted to a denial of justice, as the Lord Chancellor was the sole Judge. Where a sole Judge is incapacitated on this ground, a special course of proceeding is provided. In that case the bill ought to have been addressed, not to the Lord Chancellor, but to the Queen in Chancery; and the Master of the Rolls may then hear and decide the case—*A Discourse of the Judicial Authority of the Master of the Rolls*, p. 178, *Mitf. Plead.* p. 7. It is not a matter of discretion in a Judge whether he will make an order in such a case. Judicial discretion must be exercised according to some principle, and not against principle. Lord Camden says, "The discretion of a Judge is the

(2) 12 Rep. 114.

(3) 3 Black. Com. 299, n.

(4) 2 Str. 1173.

(5) 1 Salk. 396.

(6) Hardr. 503.

(7) 4 Term Rep. 71.

(8) 1 Q.B. Rep. 467; s. c. 10 Law J. Rep. (N.S.) M.C. 99.

(9) 6 Q.B. Rep. 753; s. c. 14 Law J. Rep. (N.S.) M.C. 73.

(10) 12 Mee. & W. 734; s. c. 13 Law J. Rep. (N.S.) Exch. 191.

(11) 10 Q.B. Rep. 827; s. c. 16 Law J. Rep. (N.S.) M.C. 84.

(12) 6 Beav. 135; s. c. 14 Law J. Rep. (N.S.) Chanc. 1.

law of tyrants; it is always unknown; it is different in different men; it is casual, and depends upon constitution, temper, and passion. In the best it is oftentimes caprice; in the worst it is every vice, folly, and passion to which human nature is liable" (13). The difficulty in this case has been occasioned by the plaintiffs. From the commencement of the suit they knew that the Lord Chancellor was a shareholder; but the defendant is now compelled to apply to this Court, and this Court will discharge its own order, and will not continue the imprisonment of the defendant when the injunction which he has disregarded is founded upon an invalid order—*Drewry v. Thacker* (14). The question of the conduct of a Judge in the cause cannot be raised upon appeal to the House of Lords; for the facts do not appear upon the record—17th Lord Bacon's *Maxims*, *Bridgman v. Holt* (15). The only remedy, therefore, for the defendant is to discharge the Lord Chancellor's order affirming the decree of the Vice Chancellor; and the defendant may then have the cause heard before an unobjectionable tribunal.

Mr. Stuart, Mr. J. Parker, Mr. Busk, Mr. Randell and Mr. G. L. Russell appeared for other parties, but were not called upon.

THE MASTER OF THE ROLLS.—Certainly it would have been a very great satisfaction to me if I had heard anything in the course of this long argument which could induce me to think that Mr. Dimes was at this time entitled to any relief. It cannot be a satisfactory thing to any Judge to have the notion, that, under an order which he has made, or which he sanctions, a party is imprisoned and thinks himself to be imprisoned unlawfully. I confess, however, that in the course of this argument I have heard nothing which tends in any degree to vary the conclusion to which I came upon the motion that was made before me at the Rolls, and I have heard nothing which induces me to think that the altered relief which is prayed for by this notice of motion ought to be granted.

Mr. Dimes is in prison under an order

(13) See *Fearne on Cont. Rem.* 535, n.

(14) 3 *Swanst.* 546.

(15) *Shower's P.C.* 111.

made by the Vice Chancellor of England, followed by the signature of the Lord Chancellor, and by the warrant of apprehension, which was signed by the Lord Chancellor, for the breach of an injunction which was granted on the 6th of July 1839, an injunction to restrain him from interfering with the navigation of the Grand Junction Canal. That he has interfered, and interfered in direct violation of that order and of the injunction is so far from being denied, so far from being attempted to be excused, that it is attempted to be justified, on the ground that the order and the injunction founded upon it were both of them illegal, and such as he is under no obligation to obey. If he had come here stating as I have understood what he alleges to be the fact, that his object in committing that act of disobedience was in order that he might obtain the opinion of the court of law upon the legality of the proceedings here, and that he had made the attempt to get that opinion and failed in procuring it,—if he had done that, and then suggested that for the disobedience to this Court he may have suffered sufficient punishment, certainly I should have felt most strongly inclined to give my humble opinion to the Lord Chancellor that he might be released, not thinking myself that it would be right, or in any degree necessary for maintaining the authority of this Court, that an imprisonment suffered under such circumstances should be unnecessarily prolonged—I will not say for a day, but—for an hour. However, that is not the course which he has adopted. He comes here avowing and justifying, and I am afraid that I am obliged to say (for I cannot get an answer to the contrary) continuing, and intending to continue, the disobedience. If I could have his authority to state the contrary, I should be extremely glad to withdraw that observation. It would give me very great satisfaction indeed to do so.

Then, the question comes simply to this: whether the proceedings have, under the circumstances, been legal or illegal. Now, I do not think I have heard anything whatever upon this, however ably and at great length this question has been argued to-day, that tends in any degree to alter the opinion that I have expressed at the Rolls. The inconvenience which may come from this

cannot very easily be doubted: the necessity of interfering in some cases cannot be very easily doubted; but I regret, as altogether unwarranted, the notion that I have ever said that the Lord Chancellor had a discretion, to be exercised at his pleasure, whether he will or will not hear such a case as this, or any other discretion than that which is accompanied by all the responsibilities which affect a Judge. Seeing, therefore, no reason to alter that opinion, I must take the liberty of now again advising his Lordship to make the order pursuant to the recommendation which I then submitted to him, and that for the same reasons which were offered at the time, and which have been—I must say, without the least impropriety—discussed at so much length by Mr. Daniel. I was surprised to find it supposed that I had admitted that, under any circumstances, the Lord Chancellor was incapable to make an order. I never said anything which would in any way justify any person in making that statement. I do not know that there is any occasion whatever for me to repeat or to vary the language in which my opinion was expressed on that occasion. I adhere to it. I desire nothing for that judgment but that it may be considered according to the ordinary meaning of the terms which are expressed: and for the reasons there stated, which I see no reason to alter, I now take the liberty of recommending to his Lordship to make the order which I then recommended.

There is another point in this argument which I do not by any means wish to pass over, which was not at all before me at the Rolls; which is, that this bill may be taken off the file. Now, I do not think that it would be a proper order to make. Why should this bill be taken off the file? The reason which is alleged at the bar is, because the bill was not addressed to Her Majesty in her Court of Chancery. Certainly, I have heard no authority for that. Certainly, I have heard no reasons which seem to me sufficient to warrant the Court in interfering at this period of the cause by any such order as that is; and I cannot recommend that course to be taken. A great part of this case really seems to have been argued as if Mr. Dimes had no

means of getting justice. Certainly, it is very difficult to maintain that argument when it comes simply to this point, whether he is to obtain a re-hearing in the Court of Chancery, or to submit to the decree, such as it is. Now, there is no such point at all raised.

Another argument which was made, adopted, I think, from the proceedings in the court of law, is this: that as this is not an objection appearing on the record, it is not an objection which could be brought before a court of appeal. I think I understand it so; but I consider that to be a mistake. It is a mistake in likening the proceedings in the Court of Chancery to the proceedings in a court of law. I do not exactly know what was the result of the case of *Bridgman v. Holt*; but it does not apply here, and for this reason. There is not the least doubt that Mr. Dimes had a perfect right to appeal from the decree and from any orders made in this court to the House of Lords. To enable him to do that, nothing is wanting but the enrolment; which enrolment, I take the liberty of saying, I think it would be the duty of the Lord Chancellor to warrant, in order that the party may appeal from the decree, whether it is the Vice Chancellor's decree, or that decree as affirmed by the Lord Chancellor, dismissing the petition of re-hearing. That is true of that decree, and it is equally true of the order to be made now. Every order which is made on petition or motion, or in any other mode in which this Court can interfere, is subject to an appeal to the House of Lords; and therefore if this order which is now to be made by his Lordship should be an order of which Mr. Dimes has reason to complain, he has nothing to do but to procure the enrolment of the order, and upon the enrolment he may carry the questions raised on these occasions, as well as the questions raised on the merits of the case, both of them to the House of Lords, and the whole matter must come under the consideration of the House of Lords, in which he will have the advantage of every objection which can be taken on the merits of the cause and every objection which is taken for want of technicality in the proceedings. It is, therefore, the grossest

mistake to suppose that there is no remedy if it is not given in the way Mr. Dimes asks. There is not and cannot be any question about it. All that passes here and every order that is made here must be subject, of course, to appeal; and if Mr. Dimes is in any way aggrieved by the orders which are made, no doubt he can have redress in that the highest tribunal the country affords, and perfectly free from any such objection as is raised on the present occasion.

One other observation I wish to make on the course which Mr. Dimes has adopted. A decree which is once re-heard by the Lord Chancellor, a decree of one of the subordinate Judges, usually finishes there in the Court of Chancery. If it gets inrolled it proceeds to the House of Lords; but it is by no means without example that a decree made on a re-hearing by the Lord Chancellor should, if the circumstances of the case require it, be heard over again. There are instances of re-hearings of decrees made upon a re-hearing, and if the specialities of the case require it that might be done, and therefore I think it was I asked once or twice below, "Is it the case here, that Mr. Dimes, being dissatisfied with the order made on the re-hearing, wishes, under the special circumstances which have come to his knowledge, and which he now represents to the Court, to have another re-hearing without more?" No, he did not wish that. His motion was, not that it might be re-heard by the Lord Chancellor with such assistance as the constitution of the Court would enable him to get, but that there might be a commission issued for the purpose of hearing it before the Master of the Rolls and the Judges of the Court of common law, which I believe is quite beyond the power and authority of the Lord Chancellor to grant. But it has never come forward in that simple form in which it might have been brought forward, namely, Mr. Dimes being, under the circumstances which he described, dissatisfied with the order made, was desirous that there might be another hearing granted to him under the special circumstances of the case. It never came forward in that form. This application to me ended in this, that it was to be restored to the

paper of the Lord Chancellor, subject, of course, to all the objections which he had raised against any proceeding whatever by the Lord Chancellor.

Now, then, thinking for myself that there is no reason—being unable to see any reason—for altering the opinion I gave: thinking that there is no ground for the application to take the bill off the file, and being fully persuaded at the same time that Mr. Dimes is not in the least degree without redress if he is suffering any grievance, but that the merits of the case as well as the propriety or impropriety of the order now made may both be brought under the consideration of the House of Lords on an appeal properly framed for the purpose; and thinking that Mr. Dimes has not applied even for a re-hearing under circumstances under which it could be granted—under all these circumstances, I think I am bound to give my humble advice that this motion be refused, and refused with costs.

THE LORD CHANCELLOR.—I am much indebted to the Master of the Rolls for the assistance which he has afforded me in hearing this application. And it is not my intention to enter at all into the subject that has been discussed at so great length at the bar, or to make any observations on the conclusion to which His Lordship has come. Having asked for his assistance, because my own jurisdiction was disputed, or, at least, the propriety of my entertaining any judicial function upon the subject of this matter, I should be undoing the act which I thought proper to adopt of requiring his assistance if I should at all interfere with, or should hesitate to adopt the advice which the Master of the Rolls has tendered to me. Certainly, I have, however, the satisfaction of feeling that the opinion he has expressed is precisely the same as I should myself have entertained if I had taken on myself to have delivered the judgment without his assistance.

Having stated so much, without at all interfering with the view which the Master of the Rolls has taken of the merits of the case, or entering into them, I will only state that difficulties may exist, and difficulties no doubt there are arising from the

jurisdiction I am called on to execute : having the sole power of that jurisdiction, as the learned counsel properly assumes, in this Court, difficulties may arise where there is an interest. If the Chancellor is a *party*, there is no difficulty : the law has provided for it : but if there be merely an *interest*, which he having would be anxious to avoid the duty of adjudicating between the parties,—and, undoubtedly, he would always be anxious to find other Judges to take that burthen from him, where there was the slightest suggestion by either party that his judgment would be influenced by having that interest,—difficulties enough arise from the position in which the Chancellor is placed. But I think that would be as nothing compared with the remedy suggested by the learned counsel, namely, that when the fact is known, the Chancellor may have jurisdiction if one party asks him to exercise it, but cannot have if the other party asks him to exercise it.

Now, I will put the present case : the cause takes a certain course ; a decree is made, or an order for an injunction is made. Suppose there is no order for an injunction. The cause goes on in regular course, and is heard by the Vice Chancellor of England, we will suppose, as was this case. Then, and then only, I will suppose, the opposite party, Mr. Dimes, for instance, discovers that the Lord Chancellor, who at that time may have heard nothing whatever of the case, is a shareholder in the company litigant with him. Why then, according to the argument, if Mr. Dimes is dissatisfied with the decree of the Vice Chancellor, the cause is to go on ; but if the other parties are dissatisfied with the decree, they have no remedy, unless Mr. Dimes thinks proper to give the jurisdiction. Now, that cannot possibly be the state of the law. It must either be that there is no jurisdiction at all, and that the whole matter is void from the beginning, or that, owing to the constitution of the Court, the jurisdiction can only be exercised in the way in which it has been exercised, namely, by the Lord Chancellor assuming it. He cannot assume it for one party, and refuse to assume it for the other.

Now, in the present case, however, I have so far satisfaction that if anybody may suppose that the interests of Mr. Dimes

have been prejudiced by my having shares in the Grand Junction Canal, in point of fact, the position of the right and the position of the property is not in the slightest degree affected by anything I have done. This stands entirely on the injunction granted by the Vice Chancellor, which remains untouched. I did not think upon the merits it ought to be touched ; but if I had had the pleasure of Mr. Dimes's acquaintance before, I should undoubtedly, when the matter came before me, have declined to interfere. Then the injunction would have remained. Again, at the hearing, the cause came before the Vice Chancellor, and the decree was made. That decree remains. All that I have done in the cause at all is to leave the orders of the Vice Chancellor untouched. So that if the proceedings are wrong—if the injunction was wrong or the decree was wrong—it is not wrong from any miscarriage in point of judgment on my part, but it rests entirely upon the orders made by the Court below. With regard to a decree, when it is not inrolled, I do not apprehend the Lord Chancellor signs it : it is merely drawn up, passed and entered ; but if it be inrolled, it becomes my order in point of form. So as to the injunction : on the writ issuing it becomes my order in point of form ; but as to any opinion on the merits, or as to any disadvantage which Mr. Dimes may be supposed to have sustained by the decision of the cause or the granting of the injunction, it does not rest on anything I have done, but on the orders of the Vice Chancellor alone ; and the utmost that Mr. Dimes can complain of is, that I have not upon the appeal varied the orders or the decree which the Vice Chancellor has pronounced.

That is all I propose to say on the matter as it stands, except this :—That if this be the law, and if that infirmity exists in this Court, some parliamentary enactment must necessarily take place, or otherwise there will be a total failure of justice ; or the Lord Chancellor, when he accepts the Great Seal, must look about him and see what interest he has in any company or association, and he must divest himself of every possible interest. I do not know how he is to do that, because he may be a holder of stock in the public funds, and

most people who are honoured with the confidence of the Crown from their circumstances are likely to be holders of stock. Suppose a question arises touching the revenue. Take the Barons of the Court of Exchequer, who are by the constitution of the jurisdiction to decide on matters of revenue. Suppose one of the Barons of the Court of Exchequer is a holder of 3l. per cents., and a question comes before them touching the Consolidated Fund. Has he not precisely the same sort of interest that I have in the Grand Junction Canal? No doubt it is more minute: more remote: and it is not likely that any decision they will come to will affect his dividend. But it is not argued on the question of quantity or degree; it is on the abstract principle, that any interest in the result of the matter to be decided upon is to incapacitate the Judge and to take away his jurisdiction. Now, there is no matter that can affect the general revenue of the country, by which the Consolidated Fund is meant, which does not to a certain degree, or may not to a certain degree, affect that fund out of which the dividends are to be paid. It is an extreme case, I admit; but questions of principle are sometimes tried by extreme cases. However, I give no opinion upon that. Fortunately for me, it has been under the consideration of the Master of the Rolls; and the Bar have heard the opinion he has expressed.

V.C. }
 March 17. } TURNER v. TURNER.

Injunction—Petition.

A suit having been instituted for the purpose of establishing the trusts of a will, a decree was made in favour of the plaintiffs, after which certain persons, claiming an interest adverse to the plaintiffs, commenced an action of ejectment against them for the purpose of disputing the will:—Held, that an injunction might be granted upon petition to restrain such action, although no injunction was prayed in the suit.

This was a petition which stated that a testator, named William Turner, had devised the greater portion of his estates

to his grandchildren for life, with remainder to their children in tail, and by his will had excluded his only daughter and heiress-at-law from any further benefit than the receipt of an annuity of 500l.; that the testator's daughter, who had married a gentleman named W. S. M. Turner, had entered a *caveat* against the proof of the will, but that the same was duly proved; that subsequently a suit was instituted in this Court for the purpose of establishing the trusts of the will, and a decree was made in favour of the petitioners; that notwithstanding such decree Mr. and Mrs. Turner had commenced an action of ejectment to recover a portion of the testator's estate for the purpose of disputing the validity of the testator's will. Under these circumstances, this petition was now presented, praying that the said W. S. M. Turner and Mary Anne his wife might be restrained by injunction from prosecuting the said action of ejectment; and that they might be restrained from commencing any other action of ejectment for the recovery of any of the property devised to the petitioners by the will of the testator.

Mr. Stuart, Mr. Fish, and Mr. Hardy appeared in support of the petition.

Mr. Bethell and Mr. Hallett opposed the petition, on the ground that an injunction could not be granted upon petition when the suit in which the petition was presented did not ask for the injunction; they cited *Lowe v. Jolliffe* (1).

Mr. Roll, Mr. Cooper and Mr. Wright appeared for other parties.

The VICE CHANCELLOR.—It appears to me that what is asked by this petition is substantially right, since the decree made in the cause has established the will. And as to whether the injunction which is prayed can be granted on petition, I think it is quite right for parties to come to the Court by petition for the purpose of obtaining an injunction to stay proceedings that are directly contrary to the decree. The order must, therefore, be made according to the prayer of the petition.

(1) 1 Dickens, 388.

LORDS COM. { *In re* THE ST. GEORGE
 July 4, 11, 15. { STEAM PACKET COM-
 PANY. *Ex parte* HEN-
 NESSY.

Company—Winding-up Act—Contributory—Defective Transfer of Shares—Waiver.

In 1841 H, a proprietor of several shares in a joint-stock company, transferred sixteen of such shares to B. The purchase was negotiated by C, who paid the purchase-money. B. neither executed nor acceded to the transfer, but repudiated the transaction. The company, in ignorance of this repudiation, entered the transfer in their books, and thenceforth sent all notices of calls in respect of these shares to B. at the residence of C. H. died in 1846, leaving D. his executor. In 1849 the company was the subject of the Winding-up Act:—Held, that the mode of transfer prescribed by the deed of settlement of the company not having been carried out by the want of the execution by the transferee, H.'s liability as a shareholder continued, and his executor was properly placed upon the list of contributories in respect of these shares.

Where the mode prescribed by the deed of settlement for the transfer of shares has not been carried out, no subsequent recognition of the title of the transferee by the directors will operate by way of waiver, as against the company, so as to release the transferor from his liabilities in respect of the shares.

In and prior to the year 1841 Michael Hennessy was a shareholder in the St. George's Steam Packet Company, and was the proprietor of one 100*l.* share and of several 25*l.* shares. In October 1841 Thomas Richard Needham, wishing to benefit his son, Richard Needham, who was an engineer and whose business made it necessary for him often to cross to and from England and Ireland, purchased of Michael Hennessy, through the medium of a broker at Cork, sixteen 25*l.* shares. The purchase was made in the name of his son, and the purchase-money, 190*l.*, was paid by T. R. Needham, the father, through his agent. Michael Hennessy shortly afterwards executed a transfer of the sixteen shares at the office of the company at Cork; but the transfer was never

executed or accepted by Richard Needham. On the contrary, it appeared that as soon as he heard of the purchase he repudiated it. The execution of the transfer was entered in the company's books, and notices of calls upon these sixteen shares were thenceforward sent to Richard Needham at the residence of his father, near Dublin, and notices of calls were thenceforward sent to Michael Hennessy in respect only of the remaining shares belonging to him. In May 1846, Michael Hennessy died, and J. C. Hennessy, his son, was his personal representative. It appeared that in 1843 the company had become insolvent and ceased to transact business; and in 1849 it became the subject of an order under the Winding-up Act. No demand was made by the company upon either Hennessy the father, or Hennessy the son, in respect of these sixteen shares, from 1841, the date of the alleged transfer, until the 12th of October 1849, when a notice was served upon Hennessy the son, as executor of Hennessy the father, calling upon him to shew cause why his name should not be put on the list of contributories to the company in respect of these sixteen shares. The question raised was, whether Michael Hennessy in 1841 had so transferred these shares as to have divested himself of all liability in respect of them. The company was carried on under a deed of settlement, and the clauses of that deed bearing upon the question are the following.—

Clause 17.—That it shall be lawful for the proprietors in the said company, or their legal representatives, whether by marriage, or as executors or administrators or legatees, to sell and transfer to any person or persons whomsoever all or any of the shares of such proprietor in the property and funds of the company; and whenever such sale and transfer shall be made, a return or account thereof shall be made to the clerk or the agent for the time being of the said company, and shall from time to time be registered in the books of the said company, on payment of the fee of 2*s.* 6*d.* on each share so transferred, and the person or persons to whom such transfer shall be made shall be and stand in all respects and to all intents and purposes in the place and stead of the per-

son or persons making such transfer, and shall be liable to be sued, in an action of covenant or otherwise, for any breach of the rules and regulations of the said company, as fully and effectually to all intents and purposes as if such person or persons to whom such transfer or transfers shall have been made had been a proprietor or proprietors at the date of these presents; and the form of transfer of such share or shares may be in the following words or to the like effect, varying the names and descriptions of the contracting parties as the case may require.—

"I of , in consideration of paid to me by of in the county of , do hereby bargain, sell, assign and transfer to the said shares of l. each numbered as per margin, of and in the capital stock of the company called the St. George Steam Packet Company, to hold unto the said , his heirs, executors, administrators and assigns, subject to the same conditions as I held the same immediately before the execution hereof. And I, the said , do hereby agree to accept and take the said shares subject to the same conditions. To witness our hands this day of , 184 .

"Witness. " (Signed.)"

Clause 18.—And every deed or transfer (being executed by the seller or sellers and the purchaser or purchasers of such share or shares) shall be delivered to and kept by the clerk of the said company, who shall enter in a proper book or books to be kept for that purpose a memorial of such transfer and sale, and indorse the entry of such memorial on the said deed of sale or transfer, for which no more than 1s. is to be paid; and on request a certificate of each share shall be delivered by him to the purchaser or purchasers for his, her, or their security, and for which certificate no more than 1s. 6d. shall be paid; and until such memorial shall have been made and entered as above directed, such purchaser or purchasers shall have no part or share in the profits of the said company, nor any interest for such share or shares paid to him, her, or them, nor any vote or votes in respect thereof as a proprietor or proprietors of the company.

Clause 21. — That any person who

being a purchaser of any shares in the capital of the company shall take a transfer or assignment of such shares, and shall not previously to such purchase have executed or otherwise acceded to these presents, or shall not, at the time of the said shares vesting in him in such capacity by the means aforesaid, be a recognized proprietor in the company in respect of any other shares in the capital, shall, as to all duties, obligations, claims and demands upon or against him in respect of such shares, be considered as a proprietor in the company from the time of the shares being so purchased by or becoming so vested in him as aforesaid, but as to all profits, rights, privileges, benefits and advantages to arise from the said shares, no such person shall be considered a proprietor in respect of the same until he shall have executed or otherwise have acceded to these presents.

Clause 51.—That the person by whom or in whose name the shares shall be held or stand, shall, to all intents and purposes whatsoever, be deemed at law and in equity the absolute, sole and beneficial owner and holder of such shares, and shall, as such, be the only person known to or recognized by the said company in all votes, transfers, notices, payments, receipts and other matters relative to the same shares, and the company shall in no case be bound to notice or affected with express notice of any proof.

Under these circumstances, the Master excluded J. C. Hennessy's name from the list; but, upon the application of the official manager, Knight Bruce, V.C. referred it back to the Master to review his report.

Mr. Hennessy now moved, by way of appeal, to discharge that order of the Vice Chancellor.

Mr. Malins and *Mr. Surrage*, in support of the motion.—The clause of the deed requiring execution by the transferee is a provision for the protection of the company, and they may waive the observance of it; they have waived it by accepting the transfer, entering it in their books, and thenceforth treating Richard Needham as the owner.

[*ROLFE, B.*—If the deed points out a particular mode of transfer, can a valid

transfer be made in any other way? His Lordship referred to a late case in the Exchequer, *In re the Shields and Sunderland Joint-stock Company, Shortridge's case* (1), where the transferee's name was entered in the company's books, but the transfer was not executed by him, and the transferor's liability was held to have continued.]

Foster v. the Governor and Company of the Bank of England (2), *Taylor v. Hughes* (3), *Burnes v. Pennell* (4). No creditor of the company could have sued Hennessy, nor could he have participated in the profits, as his name did not appear in the books of the company.

Mr. Bacon and *Mr. J. V. Prior*, for the respondent.—Hennessy, the testator, purchased these shares for his son; and the transaction amounted to no more than this, that he engaged his son should take them, or that he should forfeit his purchase-money. Hennessy would remain liable to the company until he had procured another person to stand in his place. It was the duty of the transferor to have procured execution by the transferee. The directors could not waive this, to the damage of the body of the shareholders, as it would have been tantamount to a diminution of the number of shares,—a thing not within their authority. The cases of *Burnes v. Pennell*, *Taylor v. Hughes* and *Foster v. the Bank of England*, have no application to the present case; for parties may waive rights as between themselves, but not as against the company—*In re The Vale of Neath Brewery Company, ex parte Morgan* (5).

Mr. Malins replied.

July 15.—*ROLFE, B.*, LORD COMMISSIONER, delivered the judgment of the Court, (after stating the facts of the case).—Under these circumstances, it is plain that nothing had been done by Richard Needham which could make him liable as a contributory. It was, however, argued, that though Richard Needham, the proposed transferee, might not be liable, still the company had precluded itself from treating Michael Hen-

nessy as still being one of its members. But this is not so. Michael Hennessy, in order to relieve himself from liability, was bound to procure a transferee, who should put himself in his place; the only transfer ever attempted to be made was to Richard Needham, the son, who, it is admitted, never in any manner accepted it. The mode of transfer required by the deed of settlement is, as we have already seen, a transfer to be executed by the transferee in order to signify his consent, and so to make himself liable as a purchaser. Till that had been done, the seller continues liable to the company as one of its members.

It was said that there was laches in the company in not getting the transferee to signify his acceptance or rejection. But this is not so. What could the company do more than they did? There was the transfer executed by the seller waiting to be executed by the purchaser, if he had chosen to present himself. But he never did so.

It was argued that this was really a purchase by the father, and some facts were relied on in the evidence tending to shew that the company considered and treated the father as the purchaser. This, we think, is not at all made out; but, even if it were, it would not vary the case, for it is abundantly clear that the transfer in the books was to the son and not to the father, and the evidence clearly shews that the father never accepted or intended to accept any of the shares in question. Whether as between Hennessy and Needham the father, the latter might be compelled to accept the shares, is a question not now before us.

The Vice Chancellor Knight Bruce was of opinion, that Michael Hennessy as a shareholder was liable up to the 21st of October 1841; that having never made a valid transfer, he continued liable after that date up to the day of his death, and so that the name of J. C. Hennessy, his executor, was properly placed on the list of contributories. In that opinion we entirely concur; and this motion must, therefore, be refused, with costs.

(1) Not reported.

(2) 15 Law J. Rep. (n.s.) Q.B. 212.

(3) 2 Jo. & Lat. 24.

(4) 2 M. L. Cas. 497.

(5) 1 Hall & Twells, 320; s.c. 18 Law J. Rep. (n.s.) Chanc. 265.

M.R. }
 Jan. 18, 19, 22. } HODGSON v. EARL POWIS.

Railway—Abandonment of part—Application of Capital—Demurrer—Pleading.

Three several acts of parliament were passed; the first for making a railway from Shrewsbury to Stafford, &c.; the second from Newtown to Crewe, &c.; and the third from Chester to Wolverhampton; and the name under which they were severally incorporated was "The Shropshire Union Railways and Canal Company." Each act authorized the raising of a separate sum of money. The first declared it to be general capital, and the two others to be part of the general capital. Another act of parliament was afterwards passed, which empowered the London and North-Western Railway Company to take a lease of the railway to be made under the first three acts, upon its completion, and it declared that they were and ever had been one and the same company, and not three separate companies. The directors proceeded to make the railway from Shrewsbury to Stafford, but subsequently they intimated an intention to apply to parliament for leave to abandon the rest; but they proceeded to make calls generally, upon which a bill was filed by an individual shareholder, praying that the company might be restrained from employing the funds, except for the purpose of constructing the whole line, and from making calls or enforcing payment by action, or declaring the shares to be forfeited:—Held, upon a demurrer, by the directors, for want of equity and for want of parties, that the power to raise money for the general purposes of the undertaking, and for other purposes connected therewith, was not sufficient to enable the company to apply the funds at large.

Held, also, that an allegation that the company had abandoned a part of the line, and that it would be illegal to apply the funds to complete the part not abandoned, was insufficient, there being no allegation of any intention to apply the funds to complete the part not abandoned, though it might have been properly introduced.

The demurrer was allowed, and leave was given to amend.

This bill was filed by Thomas Hodgson, one of the holders of new 20*l.* shares in

the Shropshire Union Railways and Canal Company, on behalf of himself and all other holders of 20*l.* shares in the company, except such of the shareholders named as defendants, and such of the shareholders as were represented by them, against Edward James Earl of Powis, Sir Francis Holyoake Goodricke, Bart., Richard Barrow, Joseph Grout, Thomas Groves, George Harper, George Holyoake, George Lock, Henry Newbery, John Meeson Parsons, George Stanton, Henry Tootal, Joshua Procter Westhead, and the Shropshire Union Railways and Canal Company, and it prayed that it might be declared that it was not within the powers of the Shropshire Union Railways and Canal Company, or the directors thereof, to apply any of the monies which were authorized to be raised under the powers and provisions of the Shropshire Union Railways and Canal (Shrewsbury and Stafford Railway) Act, 1846, Shropshire Union Railways and Canal (Newtown and Crewe, with branches) Act, 1846, and Shropshire Union Railways and Canal (Chester and Wolverhampton line) Act, 1846, or any of them, for the purpose only of constructing the railway from Shrewsbury to Stafford, and the works authorized to be constructed under the provisions of the Shropshire Union Railways and Canal (Shrewsbury and Stafford Railway) Act, 1846. And that the said Shropshire Union Railways and Canal Company and the said Edward James Earl of Powis, and the several other parties as directors of the company, might respectively be restrained from applying any monies, which had been paid by the holders of the 20*l.* shares, except for the purpose and with a view to the construction of the whole of the railway and works authorized to be constructed under the powers and provisions of the Shropshire Union Railways and Canal (Shrewsbury and Stafford Railway) Act, 1846, the Shropshire Union Railways and Canal (Newtown to Crewe, with branches) Act, 1846, and Shropshire Union Railways and Canal (Chester and Wolverhampton line) Act, 1846, and that the said company, and the directors thereof, might also be restrained from making any further or other calls upon the new 20*l.* shares in the said company, except for the aforesaid purposes, and from en-

forcing the payment thereof or of any calls which had been made upon such new 20*l.* shares, under the provisions of the acts relating to the said companies, or any of them, by any action or other proceedings at law, against the plaintiff or any other holders of new 20*l.* shares in the company, or from declaring any of such shares to be forfeited for non-payment of such calls, and that the company might also be restrained from taking any further proceedings in an action which they had brought against the plaintiff, and from taking any other proceedings at law against the plaintiff for the purpose of enforcing the payment of a call of 1*l.* 18*s.* per share.

The bill stated that an act, 9 & 10 Vict. c. cccxxiii., was passed for making a railway from Shrewsbury to Stafford, with a branch to Stone, and for other purposes, and was called "The Shropshire Union Railways and Canal (Shrewsbury and Stafford Railway) Act, 1846." That it recited an act to amend and enlarge the powers and provisions of the several acts relating to the Ellesmere and Chester Canal Navigation, 7 & 8 Geo. 4. c. cii.; an act to enable the united company of proprietors of the Ellesmere and Chester Canal to make a reservoir, and to establish vessels for the conveyance of goods from Ellesmere port across the river Mersey, and also to amend and enlarge the powers of the act relating to the said canal, 11 Geo. 4. & 1 Will. 4. c. li.; an act to amend and enlarge the powers of the several acts relating to the Ellesmere and Chester Canal, 7 Will. 4. & 1 Vict. c. lxxx.; an act to alter, amend and enlarge the powers and provisions of the several acts relating to the Ellesmere and Chester Canal Navigation, 5 & 6 Vict. c. xxxiii.; and also an act for uniting the Birmingham and Liverpool Junction Canal Navigation Company with the Ellesmere and Chester Canal Company, 8 & 9 Vict. c. ii. It also recited that the making of a railway from Shrewsbury to or near to the Stafford Station of the Grand Junction Railway, with a branch from such intended railway in the parish of Holy Cross and St. Giles, in the borough of Shrewsbury, to the Abbey Foregate, in the same borough, and another branch from such intended railway in the township of Plardwick, in the parish of Gnosall, to the parish

of Stone, in the county of Stafford; and another branch, diverging from such last-mentioned intended branch in the township and parish of Chebsey to the Grand Junction Railway, in the township of Shallowford, in the same parish, would be of great public advantage; and that the company of proprietors of the Ellesmere and Chester Canal were willing, with the assistance of certain persons and corporations therein mentioned or referred to, to make such branches if authorized by parliament to do so:—It was enacted that all the provisions of the Railways Clauses Consolidation Act, 1845, 8 Vict. c. 20, the Lands Clauses Consolidation Act, 1845, 8 Vict. c. 18, and all the clauses and provisions of the Companies Clauses Consolidation Act, 1845, 8 Vict. c. 16, with respect to the appointment and relation of directors, the powers of the directors and the powers of the company to be exercised only in general meetings, and the proceedings and liabilities of directors; the distribution of the capital of the company into shares; the transfer or transmission of shares; the payment of subscriptions, and the means of enforcing the payment of calls; the forfeiture of shares for non-payment of calls; the remedies of creditors of the company against the shareholders; the borrowing of money by the company on mortgage or bond, and the conversion of the borrowed money into capital should, so far as they were applicable, and not modified by the now stating act, or inconsistent with the provisions thereof, be incorporated with the now stating act, and all the provisions in the said recited act relating to the Ellesmere and Chester Canal, which should be inconsistent with any of the clauses and provisions of the said Companies Clauses Consolidation Act as incorporated with the now stating act, should be and were thereby repealed.

The bill then stated that the company was incorporated under the name of the Shropshire Union Railways and Canal Company, for the purpose of constructing the line of railway from Shrewsbury to Stafford, with branches for the same. That the Shrewsbury Canal Navigation, which was made by a company incorporated by the 33 Geo. 3. c. xci. under the name of "The Company of Proprietors of the

Shrewsbury Canal Navigation," was vested in perpetuity in the Shropshire Union Railways and Canal Company. That the Shropshire Union Railways and Canal Company were empowered to raise, by the creation of new shares for the purposes of the act, 800,000*l.* in addition to any monies they were then authorized to raise, upon such terms, and in such manner as might be agreed upon at any general meeting of the company especially convened, which shares were to be divided into shares of the nominal value of 20*l.* each, and were to be considered part of the general capital of the company. That the company was authorized to borrow 266,666*l.* on mortgage. That section 52. provided that the monies to be raised by the creation of such shares of 20*l.*, and by mortgage, should be appropriated and applied as a general fund for the construction of the railway and works thereby authorized, "and for the purposes connected therewith."

The bill also stated that another act, 9 & 10 Vict. c. cccxxiv., was passed, "for making a railway from Newtown in the county of Montgomery to Crewe in the county of Chester, with branches; and for other purposes connected therewith," called "The Shropshire Union Railways and Canal (Newtown to Crewe, with branches) Act, 1846." It recited all the acts recited in the lastly-stated act, and also another act of parliament, intituled, "An act to enable the united company of proprietors of the Ellesmere and Chester Canal to raise a further sum of money," 9 & 10 Vict. c. v. It incorporated the subscribers under the name of "The Shropshire Union Railways and Canal Company," for the purpose of constructing a railway from Newtown to Crewe, with branches therefrom to Ellesmere, Wem, Whitchurch and Crewe. That by this act (sect. 6.) the company was empowered to raise, by the creation of new shares, for the purposes of this act, 1,500,000*l.* in addition to any monies they were then authorized to raise, upon such terms as might be agreed upon at any general meeting of the company especially convened, such new shares to be divided into shares of the nominal value of 20*l.* each, and to be considered part of the general capital of the company. That many of

the provisions of the lastly-stated act were similar to the now stating act, but by sect. 64. of this act it was provided, that all the provisions in this act which were identical with the provisions contained in either the lastly hereinbefore stated act or the act next hereinafter stated should be and the same were thereby repealed.

The bill then stated that another act, 9 & 10 Vict. c. cccxxii., was passed, "for making a railway from the Chester and Crewe branch of the Grand Junction Railway at Calveley to Wolverhampton; and for other purposes connected therewith," called "The Shropshire Union Railways and Canal (Chester and Wolverhampton line) Act, 1846," and after reciting the several acts relating to the Ellesmere and Chester Canal Navigation Company, and also reciting the hereinbefore mentioned act, for enabling the said company to raise a further sum of money, it incorporated the company under the name of "The Shropshire Union Railways and Canal Company," for the purpose of constructing a railway from the Chester and Crewe branch of the Grand Junction Railway, in the township of Calveley, in the county of Chester, to Wolverhampton, in the county of Stafford. That the company (sect. 67.) was authorized to raise, by the creation of new shares, for the purposes of the now stating act, the sum of 1,000,000*l.* in addition to any monies they were then authorized to raise, which shares were to be divided into shares of the nominal value of 20*l.*, and were to be considered part of the general capital of the company. That (sect. 69.) when the whole of the capital in shares, by the now stating act and all other acts relating to the said company authorized to be raised, should have been subscribed, and one-half thereof should have been paid up, the said company were empowered to borrow on mortgage, not exceeding one-third of the capital of the company for the time being, and to secure the payment, with interest, upon the several canals and railways comprised in the undertaking of the said company, including the railways thereby authorized. That before the passing of the several acts which received the royal assent on the 3rd of August 1846, the Shropshire Union Railways and Canal Company began

to raise the several sums of 800,000*l.*, 1,500,000*l.* and 1,000,000*l.*, and for that purpose the directors issued 165,000 shares, of the nominal value of 20*l.* each, for which, upon payment of 2*l.* 2*s.* per share, they issued scrip certificates; but no general meeting of the company was held for creating such shares, and on the 4th of August 1846 the company proceeded to exchange the scrip certificates for others under seal, which were registered in the books of the company. The plaintiff became a purchaser, and was now registered as holder of 660 of such new shares.

The bill also stated that an act, 10 & 11 Vict. c. cxxi., was passed, "to authorize a lease of the undertaking of the Shropshire Union Railways and Canal Company to the London and North-Western Railway Company," by which, on completion of the works of the several railways, the Shropshire Union Railways and Canal Company was empowered and required to grant, and the London and North-Western Railway Company was empowered and required to accept a lease in perpetuity of the Shropshire Union Railways and Canal, at a rent specified in the act. And section 34. provided that the company of proprietors of the Ellesmere and Chester Canal should thenceforth be called the "Shropshire Union Railways and Canal Company," and that the subscribers to the undertaking thereby authorized should be incorporated and form part of such company; and it was enacted, that the Shropshire Union Railways and Canal Company referred to in the said therein-recited "Shropshire Union Railways and Canal (Newtown to Crewe, with branches) Act, 1846," "Shropshire Union Railways and Canal (Chester and Wolverhampton line) Act, 1846," and "Shropshire Union Railways and Canal (Shrewsbury and Stafford Railway) Act, 1846," was and ever had been one and the same company, and not three separate and distinct companies.

The directors made several calls upon the registered holders of new shares of 20*l.* each: in March 1847, of 1*l.* 18*s.* per share; in October 1848, of 1*l.* per share; and in July 1849, of 10*s.* per share; and in September 1849, of 1*l.* per share.

In consequence of the plaintiff's refusal

to pay, the directors brought an action against him, in the Exchequer of Pleas, for 1,254*l.*, under the 8 Vict. c. 16, the Companies Clauses Consolidation Act, 1845, and by virtue of the 9 & 10 Vict. c. cccxxii. Upon the trial of the action, a verdict was found for the company, subject to a special case, as to whether any meeting of shareholders in the Shropshire Union Railways and Canal Company should have been called for the purpose of issuing the said new shares of 20*l.* each, in compliance with the provisions of the acts relating to the company, and whether in fact such shares were duly issued.

The bill then stated that the only portion of the works commenced was under the powers of the "Shropshire Union Railways and Canal (Shrewsbury and Stafford Railway) Act, 1846," and that no portion of the railway and works authorized to be constructed under the powers of the "Shropshire Union Railways and Canal (Newtown to Crewe, with branches) Act, 1846," or the "Shropshire Union Railways and Canal (Chester and Wolverhampton line) Act, 1846," or either of them, had been commenced; but that a portion of the line of railway between Shrewsbury and Stafford was opened for public passenger traffic in June 1849. That the deposits and calls, if paid upon the 165,000 shares, would amount to 1,072,500*l.*, but under the provisions of the "Shropshire Union Railways and Canal (Shrewsbury and Stafford) Act, 1846," the company was only authorized to raise 800,000*l.* That on the 27th of September 1849, the directors in their report stated that no further works would be undertaken beyond the completion of the Shrewsbury and Stafford line; and the chairman in his speech announced that they did not propose to construct the Newtown and Crewe or the Chester and Wolverhampton lines, and that they had no intention of carrying on those works, and therefore they had no further works to accomplish, save that which was necessary for the finishing of the line between Shrewsbury and Stafford, the goods station, and such like; that there were no new works, in the engineering sense of the words, to be undertaken.

The bill also stated that the directors had caused an advertisement to be published, to the effect that they intended to apply to parliament for an act to authorize the Shropshire Union Railways and Canal Company to relinquish and abandon the formation of the whole of the railways, branch railways and works respectively authorized to be made by the 9 & 10 Vict. c. cccxxiv. and the 9 & 10 Vict. c. cccxxii., and to repeal all powers contained therein for constructing or maintaining the said railways, branch railways and works, or for converting into railways the canals mentioned in the acts, or for stopping up such canals. That, in fact, the company and the directors had abandoned all intention of making the whole or any part of the railways or works from Newtown to Crewe and from Chester to Wolverhampton. That on the 27th of September 1849, the balance sheet shewed that there had been received upwards of 765,000*l.* on the railway capital account of the company, and that they had a balance in hand of 109,016*l.* 8*s.* 1*d.* That the company and the directors were not authorized to make a railway from Shrewsbury to Stafford only, and that to apply the monies for that purpose only, instead of for making the whole lines of railways authorized by the acts, was illegal. And that the directors had no power to apply the monies raised under the provisions of the 9 & 10 Vict. c. cccxxiv. and 9 & 10 Vict. c. cccxxii., for the purpose of only constructing the railways and works authorized by the 9 & 10 Vict. c. cccxxiii. That the directors had threatened other shareholders besides the plaintiff with actions for the non-payment of their calls.

The bill then charged that the number of shareholders was so great, and their interests, rights and liabilities so subject to changes and fluctuations, by death or otherwise, that it was not possible to make them parties to the suit, and that to do so would render it impossible to prosecute the suit, but that they had a common interest in the relief sought for.

To this bill the directors put in a general demurrer, for want of equity and also for want of parties.

Mr. Turner, with whom was *Mr. Willcock*, in support of the demurrer.—It is illegal for one railway to apply its

capital for the benefit of another; and if that is done an individual member of the company may file a bill against the directors and the company, to restrain them. But, in the present case, that is not the position of the parties under their several acts of parliament. One company was incorporated by each act, but they were parts of one line only and of one company; and the 10 & 11 Vict. c. cxxi. declared that the whole of the lines were and ever had been one company. The 9 & 10 Vict. c. cccxxiii. authorized the company to raise 800,000*l.*, but it did not say that it was to be exclusively employed for making the line from Shrewsbury to Stafford; on the contrary, it distinctly referred to other purposes connected therewith. The 9 & 10 Vict. c. cccxxiv. incorporated the company for making that part of the line from Newtown to Crewe, with a capital of 1,500,000*l.*, which was to be considered part of the general capital of the company. The 9 & 10 Vict. c. cccxxii. incorporated the company to make that part of the line from Chester to Wolverhampton, with a capital of 1,000,000*l.*, which was also to be considered as part of the general capital of the company, and no restriction was made by the legislature confining the capital to each particular line. It must therefore be considered as general capital, and applicable to the general purposes of the Shropshire Union Railways and Canal Company, and the purposes connected therewith; there was nothing to restrict the company from making the calls. It was then said, that the only part of the undertaking made was the line from Shrewsbury to Stafford, and that the sums raised by calls amounted to 1,072,000*l.*, when the act empowered the company to raise 800,000*l.* only; that 765,000*l.* had been raised on the railway capital account, and that there was then a balance in hand of 109,016*l.* 8*s.* 1*d.*, after making the line from Shrewsbury to Stafford; but this was immaterial, as the money was raised generally for the benefit of the whole of the lines, and would be applicable to pay the debts of the Ellesmere Canal, supposing they remained unliquidated. It was also stated that the company had opened negotiations with the London and North-Western Railway Company, for reducing

the capital, and for the abandonment of the railways from Newtown to Crewe and Chester to Wolverhampton, but such was not intended without the sanction of parliament. It however appeared from this, that the London and North-Western Railway Company were necessary parties to the suit, as also were those of the new 20*l.* shareholders who had paid up all the calls made upon their shares. The defendants, however, did not intend to abandon any part of the lines without the sanction of parliament.

Mr. Malins, Mr. Roundell Palmer and Mr. Westoby, in support of the bill.—In this case power is given by these acts to construct 230 miles of railway, and there is nothing inconsistent in the apportionment of the capital, as the misapplication of one only of two funds would give the plaintiff a right in equity to restrain such misapplication — *Bagshaw v. the Eastern Union Railway Company* (1). This bill is founded upon the principle, that a distinct capital is to be applied under each separate act; but there either is an appropriation of a distinct capital to each undertaking, or an appropriation of the whole capital to the completion of the whole of the works authorized by the several acts, but it is immaterial to consider whether there was a continuous line, or a general scheme: it certainly appears, that one fund was to be applied to the whole; but the directors have made the line from Shrewsbury to Stafford; there they propose to stop, and to apply the money raised, and which had been called for to complete that part of the works, without any view to complete the whole of the undertakings. The bill contains sufficient allegations of abandonment and a distinct allegation of the fact. If the capital which the acts authorized to be raised was entire, the company, as in *Cohen v. Wilkinson* (2), were using it to complete that part from Shrewsbury to Stafford only. If each scheme was a separate undertaking, then the directors were suing for calls on abandoned undertakings. It was argued that the money might be wanted for other

legitimate purposes, but the Court would not assume the existence of a debt. Then, as to parties. It was not necessary to make the London and North-Western Railway Company parties, they were not shareholders, and any right they might have must exist by contract; their situation was similar to that of other parties having contracts; they were authorized to accept a lease when the undertaking was completed, but the Shropshire Union Railways and Canal Company was under no obligation to the London and North-Western Railway Company to complete it.

Mr. Turner, in reply.

THE MASTER OF THE ROLLS.—I have no doubt but that the principles acted upon in the case of *Cohen v. Wilkinson* apply to cases of this kind; consequently, as it is distinctly alleged that these powers, though they at first originated in separate acts of parliament, have become vested in the company for the purpose of completing the several works, which are authorized by all the acts of parliament, the directors have no right to apply the funds of the company to complete a part and abandon the rest: that is what is alleged over and over again in this bill. It is, therefore, no answer to the case, or a sufficient distinction between the cases, that these acts of parliament evidently contain powers to do works "for purposes connected therewith;" that expression is so indistinct in itself, and is so necessarily to be presumed to mean a portion of the works connected with these acts, that it is quite insufficient to enable them to apply it at large, and as they think fit; but if it is true, as alleged, that this bill contains allegations that they have abandoned a part of their line, and that it would be illegal to apply the funds to complete that part of the line which is not abandoned, but does not state any intention, still less any fact, of applying the funds of the company to complete the parts which are not abandoned, and no answer is given to it, I think it wants a most material allegation for support in this court,—an allegation which in all probability might have been truly introduced; and, therefore, it is that circumstance which makes me say, that allowing the demurrer on that ground, I must give the plaintiff

(1) 7 Hare, 114; s. c. 18 Law J. Rep. (N.S.) Chanc. 193. Affirmed on appeal, 2 Hall & Twells, 201.

(2) 1 Hall & Twells, 554; s. c. 1 Mac. & Gor. 481; 18 Law J. Rep. (N.S.) Chanc. 378, 411.

leave to amend in order that he may bring forward the case more completely. I will not send him out of court on the want of an allegation of that kind, although I think it prevents him from having the relief he now asks.

I am very much inclined to think that it would be proper to make the London and North-Western Railway Company parties, because of the agreement entered into between the companies. But I do not mean to give any decisive opinion; the plaintiff must act upon his own discretion.

I, therefore, allow the demurrer, as the bill does not contain a sufficient allegation that the company intend to apply any of the funds of the company to complete a portion of the line after they had abandoned the rest; and I give the plaintiff leave to amend the bill generally.

K. BRUCE, V.C. } In re THE DIRECT EXETER,
May 30. } PLYMOUTH AND DEVON-
L.C. } PORT RAILWAY COM-
June 5. } PANY, *ex parte* BESLEY.

Company—Winding-up Acts—Provisional Committee-man—Contributory—Inchoate Company.

B. allowed his name to be used as one of the provisional committee of a projected railway company. A managing committee was afterwards appointed, and 100 shares were allotted to B, whereupon he wrote to the secretary, declining to accept the shares, and requiring his name to be withdrawn from the list of the provisional committee. This request was, however, not acted upon. After certain expenses had been incurred by the managing committee, the scheme proved abortive. B, never having previously interfered in the affairs of the company, attended certain meetings of the provisional committee for winding up the affairs of the company, and he joined in signing an agreement, whereby the parties signing agreed to pay a rateable proportion of the debts. Under resolutions passed at such meetings, B. paid several sums of money. The company being ordered to be wound up,—Held, that, under the circumstances, B. was a contributory.

A provisional committee was formed for carrying out a projected railway. After

certain expenses had been incurred, the scheme proved abortive :—Held, that such an association was "a company" within the meaning of the Winding-up Acts, 1848, 1849.

In October 1845, Mr. Besley was solicited by one of the provisional committee of the Direct Exeter, Plymouth and Devonport Railway Company to become a member of such provisional committee, upon the assurance that he should not incur any responsibility by so doing. Mr. Besley verbally assented to become one of such provisional committee.

On the 7th of October a committee of management was appointed.

On the 6th of November 1845, Mr. Besley, having heard that certain shares had been allotted to him as one of the provisional committee, wrote a letter of that date to the then secretary of the company, as follows:—"Sir,—I find it will not be convenient for me to take up the shares which are allotted to me as one of the provisional committee of the Direct Exeter, Plymouth and Devonport Railway Company; I must, therefore, request that my name may be taken from the list, and I give you this early information that I may be no obstacle to the shares being allotted to another person. (Signed) W. H. Besley."

In the minute-book of the company was an entry with respect to a meeting of the managing committee, held on the 7th of November, as follows:—"Letters from Capt. Berkley, W. H. Besley, Esq. and others, desiring to withdraw their names from the provisional committee, having been laid before the committee, it was resolved that the secretary be instructed to inform any gentleman wishing to have his name withdrawn from the provisional committee, that his wish shall be complied with in the future publications of the company." This resolution was not communicated to Mr. Besley, and it appeared that his name continued on such list until the order for winding up the affairs of the company.

On the 31st of December 1845 a meeting of the provisional committee was held, at which certain resolutions were passed as to the liabilities of the members of the provisional committee, and the sums to be

contributed by them in respect thereof, being at the rate of 3s. in respect of each share allotted to them respectively. Mr. Besley did not attend any of the meetings of the provisional committee previously to the meeting of the 31st of December 1845, and he was not then present until all the resolutions had been passed.

On the 14th of January, Mr. Besley paid to the credit of the company 15*l.*, as his contribution in respect of the liabilities of the company, being at the rate of 3s. per share on 100 shares. On the 19th of January 1846, several members of the provisional committee, including Mr. Besley, entered into and signed an agreement to bear an equal proportion of the debts, damages and costs which any of the persons signing the agreement might be compelled to pay in respect of the company.

On the 12th of March 1846, Mr. Besley received the following letter from the secretary of the company:—"Sir,—I am instructed to forward to you, as one of the provisional committee, a copy of the resolutions unanimously adopted at a general meeting of the provisional committee, on the 2nd inst., and to request that you will pay into the bank of Messrs. S. & Co., of, &c., the sum thereby required, or so much as with any previous payment you have made will make that amount, &c. The committee hope that the payment now required will be sufficient to relieve the members of the provisional committee from further claims, and trust that each member will see that, by complying with the terms of the resolution, he will save himself from much heavier demands, and probably much personal annoyance, as the committee must give the names of defaulters to the creditors, who will no doubt immediately bring actions against them for their claims on the company. (Signed) H. G. Farrant, Sec. *pro tem.*—March 2, 1846. At a meeting of the provisional committee held this day, it was unanimously resolved, that a particular of the claims upon the company be left at the offices, 5, Bedford Circus, Exeter, and forwarded to the solicitors, for the inspection of the members of the provisional committee; that the secretary inform every member of the provisional committee that unless 65*l.* be paid on or before Wednesday the 26th inst., their names will be handed over to the creditors."

On the 25th of March, Mr. Besley, in pursuance of the demand, paid 50*l.* to the credit of the company.

On the 31st of August 1846 a meeting was held of the provisional committee, whereat it was resolved "that the members who are here present agree to pay the sum of 50*l.* or such other sum as will make up, with previous payments, 115*l.*; and they determine by every influence and power they possess to resist or prevent any further demand being made upon such persons as have contributed 115*l.*," &c. "That Mr. Floud be requested immediately to cause the creditors of the company to apply to such provisional committee-men, and enforce payment from such as have not paid their respective contributions, in order to wind up the affairs of the undertaking as soon as possible."

No shares had been accepted by any of the allottees, and Mr. Besley had never applied for any shares. Under these circumstances, the Master placed Mr. Besley upon the list of contributories to the company.

Mr. Besley then moved before Knight Bruce, V.C. that his name might be excluded from the list.

Mr. Karslake appeared for the motion; and—

Mr. Russell and Mr. Roxburgh, in support of the Master's decision.

The following judgment was pronounced.

KNIGHT BRUCE, V.C.—The company which was ordered to be wound up in this case was the Direct Exeter, Plymouth and Devonport Railway Company. In that company Mr. Besley never held or accepted a share, and never agreed to hold or accept a share, and it appears clear to me that he is not a member of the company which has been directed to be wound up. The definition clause says (1), that "the word 'member' shall mean any person entitled to a share of the assets or accruing profits of any such company at the time of presenting the petition for dissolving the same, or winding up the affairs thereof under the act." But, although not a member, it is contended that he is a contributory, and as a contributory he is a person who ought to be included in the list of contributories. As to the word "contri-

(1) 11 & 12 Vict. c. 45. s. 3.

butory," this is said in the clause to which I have just alluded:—it "shall include every member of a company," which Mr. Besley is not, "and also every other person liable to contribute to the payment of any of the debts, liabilities or losses thereof," that is, of the company. In this case of the Direct Exeter, Plymouth and Devonport Railway Company, Mr. Besley not being a member, is he yet a person liable to contribute to the payment of the debts, liabilities, or losses of that company? Now, upon that the first question that arises is, whether the provisional committee of which he was a member is identical with the company. If it is, then by being a member of the provisional committee, he was in effect a member of the company for that purpose, although he had no share; but I have heard nothing that induces me to think that the provisional committee is or was identical with the company. The object obviously of a committee seems to have been to procure the formation of a company: they were not themselves the company as I understand the matter. Therefore, I think, as a member of the provisional committee, this gentleman was not a member of the company. Then, is he liable to contribute to the debts, liabilities, or losses of the company? I do not see any ground for supposing that he is. He may be liable, and I assume for the purposes of the argument, that he is liable to the debts, liabilities, or losses of the provisional committee. For instance, the provisional committee, as an association of gentlemen, may have hired a room, servants and furniture for a certain particular purpose, and for what they so hire may be liable to pay not as a company, but as a provisional committee. The persons who actually enter into that contract would be bound to contribute among themselves to the performance of it, in order that each of those persons may bear his just burden *inter se*. Therefore, if the provisional committee could have been and had been directed to be wound up, it may be that Mr. Besley would have been one of the contributories of it,—I assume it for the purpose of argument. But it is not the provisional committee that is directed to be wound up, but the Direct Exeter, Plymouth and Devonport Railway Company, which, in my judgment, was not the provisional committee, and therefore, that a provisional

committee-man did not, by incurring expenses or liabilities as such, become liable for the payment of the debts, liabilities, or losses of the company. I must, although with very high respect for the Master's opinion, and no one values it more than I do, or knows the value of his intelligence, learning and experience more than I do,—I must respectfully express my dissent from it. It does not appear to me that this gentleman has been established to be a contributory of the company directed to be wound up. I do not decide that there is no company. All I decide at present is, that in my judgment Mr. Besley has not been proved to be a contributory to the company, being of opinion that a contributory to a provisional committee and a contributory to a company are different.

June 5.—An application was made on behalf of the official manager, by way of appeal, to the Lord Chancellor to discharge the order of the Vice Chancellor.

Mr. Roxburgh, for the appeal, cited—

In re the Vale of Neath, &c. Brewery Company, ex parte Morgan, 1 Mac. & Gor. 225; s. c. 1 Hall & Twells, 320; s. c. 18 Law J. Rep. (N.S.) Chanc. 265.

Ex parte Hollinsworth, in re the Ipswich and Southampton Railway Company, 5 Rail. Cas. 623.

Ex parte Cottle, post, p. 366.

Ex parte Parbury, in re the Direct London and Exeter Railway Company, 13 Jur. 725.

In re the Universal Salvage Company, ex parte Lord Mansfield, 1 Hall & Twells, 593; s. c. *ante*, 258.

Mr. Karslake, in support of the order below, cited—

Bell v. Lord Mexborough, 5 Rail. Cas. 149; s. c. 17 Law J. Rep. (N.S.) Chanc. 296.

Bailey v. Macaulay, 19 Law J. Rep. (N.S.) Q.B. 73.

THE LORD CHANCELLOR.—I cannot, for a moment, entertain the idea that this company had not advanced to that state which made it the proper subject of an order under the Winding-up Act. It may be quite right to draw within the operation of

the act an immense mass of associations or companies (whichever you may call them), and they may require as much the aid of the act as if they had gone on further. Whether you call it a company or an association, or whatever name it may go by is quite immaterial, because it is a company in fact; it has become a company within the meaning of the Winding-up Act; and an association or a company giving the Court power to wind up its affairs. The only question is, whether this gentleman has or has not rendered himself liable as a contributory to any part of the expenses incurred in this association, commencing in a provisional committee, appointing a committee of management, and afterwards, finding their affairs could not proceed, going before the Master to have their affairs wound up. The facts which appear before me are these:—That Mr. Besley was originally ostensibly a member, and that he consented to his name being put down as a member of the provisional committee for the purpose of instituting the company. At a subsequent period he was desirous, according to his own statement, of withdrawing. By some means or other he had ascertained that shares were ordered to be allotted to him, and he then gave a notice that he did not want any shares, and that he wished to withdraw, and he gave an authority to the secretary to withdraw his name. That was not acted upon; at any rate his name remained, and it remained there until the last moment as a member of the provisional committee. In the mean time things go on. The provisional committee appoint a committee of management, and expenses, which are incidental to the commencement of such proceedings, are necessarily incurred. Other expenses arise. Mr. Besley does remain a provisional committee-man. It is not necessary to consider whether that mere fact, without more, would make him liable to anybody. The case does not require any observation on that point of it, because there is so much more as to render it unnecessary to consider what the effect of that would be. But he does remain a provisional committee-man; he attends meetings of the provisional committee, which appoints a managing committee; the managing committee reports on

the expenses incurred, he concurs in an order for the purpose of liquidating those expenses, pays his share, and so he continues. He goes on allowing his name to remain; and although I cannot say that he was under any mistake as to the course he adopted when he found his name was not withdrawn, yet I cannot help being struck with the fact, that after he knew his name remained there, he did not take any further course to get his name taken off; but then comes this fact. It is by your name remaining coupled with the fact of your knowing it, that your liability arose, and you act on that liability and pay. What did he pay? Was he conscious that his apparent liability arose merely because his orders had not been carried into effect? No such statement appears; but there is the fact of his agreement to pay a proportion of the expenses. I cannot have better authority for saying he is liable than his own act. It is not an act done in mere ignorance of the law, but it is an admission of facts which, if established one way, would shew his liability to be considered a contributory beyond all question. In that view it is that the fact of payment becomes important, because he recognizes circumstances which, under any view of the law, would render him liable to contribute. I do not know that anything can be more dangerous than when a man's overt acts shew an acknowledgment of a liability, to permit him to say, "I did so, no doubt, and it appears I acknowledged my liability, but I did so under a false impression of the law." No such impression appeared to have operated on his mind at the time; but, on the contrary, all the facts shew that he considered he was so far connected with the company as to render him liable to some extent to pay. Looking at the words of the act I think he falls within the description of the act; that the Master was right in including him in the list; and therefore, of course, that the Vice Chancellor's order was wrong in striking him off.

Order of the Vice Chancellor discharged;
Mr. Besley to pay the costs of the motion
before the Vice Chancellor.

V.C.
 April 25, 27. } *In re* THE WOLVERHAMPTON,
 } CHESTER AND BIRKENHEAD
 LORDS COM. } JUNCTION RAILWAY COM-
 June 20; } PANY, *ex parte* COTTLE.
 July 15. }

Company—Winding-up Act—Provisional Committee-men—Contributories.

C. allowed his name to be used as a provisional committee-man, but never acted as such, and never took the shares necessary for qualifying him to be on the committee, and had not signed the subscribers' agreement or parliamentary contract:—Held, reversing the order below, that C. was not liable as a contributory.

A project was entered into, in the year 1845, for the formation of a company, to be called "the Wolverhampton, Chester and Birkenhead Junction Railway Company," and a prospectus was issued by the managing committee, which was sent to various persons, and among others to Mr. Cottle, a gentleman residing in Leamington, with a request that he would allow his name to be placed on the provisional committee. In answer to this application, Mr. Cottle wrote to the following effect:—"Gentlemen,—I have received from Messrs. Browne & Clarke the prospectus of the Wolverhampton and Birkenhead Railway. I shall have no objection to comply with your request, and will thank you to insert my name, and also that of my friend Mr. Hyde Clark." After this the provisional committee at one of their meetings passed a resolution, that each member of such committee should have the option of holding one hundred shares in the company, and that it should be compulsory upon every member to hold at least twenty-five shares. The following letter was then written to Mr. Cottle by the solicitor for the company:—"Sir,—I am directed to inform you that the committee of management have, in compliance with your application, allotted to you twenty-five shares in this undertaking, and that the deposit of 2*l.* 2*s.* per share, amounting to the sum of 52*l.* 10*s.*, must be paid to one of the under-mentioned bankers, who, upon receipt thereof, will sign the voucher at the foot of this letter. This letter, with the banker's receipt, must be exchanged for

scrip certificates, which will be granted upon your executing the subscribers' agreement and parliamentary contract, without which no person will be recognized as a subscriber, or be entitled to any interest in the undertaking." It appeared that Mr. Cottle returned no answer to this letter, that he never attended any meeting of the provisional committee, and that he did not pay the deposit upon the shares allotted to him, nor did he sign any contract or subscribers' agreement. The project was afterwards abandoned, and in November last the usual order was obtained for winding up the affairs of the company, and the matter was referred to Master Brougham, who expunged the name of Mr. Cottle from the list of contributories. A motion was now made, on behalf of the official manager of the company, that the decision of the Master might be reversed, and the name of Mr. Cottle restored to the list of contributories.

Mr. Bethell and *Mr. Glasse* appeared in support of the motion, and contended that as Mr. Cottle had consented to become one of the provisional committee, his name ought, under the terms of the act, to be placed among the contributories, and he was liable to pay his share of the expenses incurred. The 3rd section of the act, 11 & 12 Vict. c. 45, which explained the meaning of the words used, declared that the word "contributory" should include every member of a company, and also every other person liable to contribute to the payment of any of the debts, liabilities or losses thereof, whether as heir, devisee, executor, or administrator of a deceased member, or as a former member of the same, or as heir, devisee, executor, or administrator of a former member, or otherwise howsoever; and the word "member" was declared to mean any person entitled to a share of the assets or accruing profits of any such company at the time of presenting the petition for dissolving the same or winding up the affairs thereof under the act.

The following cases were cited in support of the motion—

Ex parte Hollinsworth, in re the Ipswich and Southampton Railway Company,
 5 Rail. Cas. 623.
Angas's case, 1 De Gex & S. 560.

Ex parte Parbury, in re the Direct London and Exeter Railway Company, 13 Jur. 725.

Mr. Rolt and Mr. James, in opposition to the motion, contended that Mr. Cottle not having taken up the shares allotted to him, or complied with the conditions prescribed, he had never become entitled to the shares, and could not claim any benefit from them. Consequently, he could not be liable to the expenses which had been incurred. Mr. Cottle had never qualified himself to become one of the provisional committee, and could not participate in the profits of the company. Although he had allowed his name to be used as a provisional committee-man, still he had never attended any of the meetings, and had not joined in sanctioning the resolutions passed by the committee; therefore, on this ground also, he could not be made liable for the debts incurred by them, and ought not to be placed on the list of contributories. The following authorities were cited—

Reynell v. Lewis and Wyld v. Hopkins, 15 Mee. & W. 517; s. c. 16 Law J. Rep. (N.S.) Exch. 25.

Wood v. the Duke of Argyle, 6 Man. & G. 928; s. c. 13 Law J. Rep. (N.S.) C.P. 96.

Bailey v. Macaulay, 19 Law J. Rep. (N.S.) Q.B. 73.

April 27.—The VICE CHANCELLOR.—I have looked through the act of parliament, and it appears to me that the 11 & 12 Vict. c. 45. would include persons as contributories who really might not have any beneficial interest in the company. A case might occur in which a person should pay 100*l.* as an indemnity against any expenses that might be incurred. In that way parties might expose themselves to liability, without having any chance of deriving profit, and might render themselves liable without being members. In the definition of the word “member” in the 3rd section of the act, it is declared to mean any person entitled to a share of the assets or accruing profits of the company at the time of presenting the petition for winding up, and the word “contributory” is declared to “include every member of a company, and also every other person liable

to contribute to the payment of any of the debts, liabilities or losses thereof, whether as heir, devisee, executor or administrator of a deceased member, or as a former member, or as heir, &c. of a former member, or otherwise howsoever.” Now, in this case, Mr. Cottle is admitted to have allowed his name to be placed on the provisional committee; and during that time certain expenses were incurred, and although a resolution was passed by the committee that each committee-man should be obliged to take twenty-five shares before he could be allowed to act, still my opinion is, that as long as Mr. Cottle allowed his name to be used as a provisional committee-man he rendered himself liable to the consequences of any act which the committee thought fit to direct. It does not appear to me necessary, in order to render a person liable as a provisional committee-man, that he himself should have any direct interest in the company. My opinion therefore is, that Mr. Cottle must, under these circumstances, be considered as a contributory within the meaning of the act, and that at any rate he would come under the last words of the clause “or otherwise howsoever.” If this construction were not to be put upon the act, it would be palpably defective, and one material class of persons would be omitted. The motion must therefore be allowed, and the Master’s decision, expunging the name of Mr. Cottle, must consequently be reversed.

Mr. Cottle now moved, by way of appeal, to discharge the order of the Vice Chancellor.

Mr. Rolt, Mr. J. O. James and Mr. Clarke, for the motion.—The appellant never did anything to make himself legally liable to the creditors of the concern—*In re the North of England Joint-Stock Banking Company ex parte Hall* (1), 11 & 12 Vict. c. 45. s. 58. He was not liable for the acts of the rest of the committee which he did not expressly sanction; and no sanction can be implied from the fact of his having consented to be named as one of such committee—*Burnside v. Dayrell* (2), *Reynell v. Lewis, Wyld v. Hopkins*; and he clearly does not come

(1) 1 Hall & Twells, 580; s. c. *ante*, p. 69.

(2) 19 Law J. Rep. (N.S.) Exch. 46.

within the other definition of a contributory as a member, for he neither accepted nor agreed to accept any shares in the concern.

Mr. Bethell and *Mr. Glasse* in support of the order below.

July 15. — *ROLFE, B.* delivered the judgment of the Court.—In this case the Master had excluded the name of *Mr. Cottle* from the list, but his Honour the Vice-Chancellor of England on a motion, by the official manager, overruled the judgment of the Master, and ordered *Mr. Cottle's* name to be included among the contributories. [His Lordship here stated the facts of the case.] His Honour the Vice-Chancellor of England, in ordering *Mr. Cottle's* name to be placed on the list, stated that he founded his judgment on the ground that by allowing his name to stand on the provisional committee, *Mr. Cottle* became liable *in foro conscientiae* to contribute rateably with the other members of that body. And again, his Honour says, that while *Mr. Cottle* allowed his name to stand on the provisional committee, he might become liable to the consequences of any order that a provisional committee-man might give. We feel compelled to dissent altogether from this view of the law. The cases of *Reynell v. Lewis* and *Wyld v. Hopkins* establish conclusively that at law a person by authorizing his name to be placed on the provisional committee gives no authority to any other member of the committee to enter into any contract whatever. All that a person does by becoming a member of a provisional committee, is to signify his approbation of the scheme, and to engage that he will concur with the others in such acts as he may approve of, and may think conducive to the objects in view. If, indeed, he expressly or impliedly gives authority to any one or more of the committee to act for him, then whatever is done in pursuance of that authority is of course obligatory on him in such a case: if goods are purchased he may be sued by the seller; or if work is done he may be sued by the party who has done the work; and if any other committee-man jointly liable with him has paid for the goods or for the work, he may be sued by that party for contribution. But

the result of the two cases at law to which we have referred (and very many cases have since been decided on the same principle) is, that the mere fact of becoming a member of a provisional committee gives no authority whatever to any one. It was indeed argued before us, that although a person by being on a provisional committee does not make himself liable to third persons for dealings between them and other members of the committee, yet that he does become liable as between himself and such other members to contribute rateably in respect of their outlay. But this is an entire fallacy. The obligation to contribute is a legal obligation, and may be enforced by action at law, though often far more conveniently in equity, and, in the case of several persons jointly contracting for their common benefit, arises from an implied contract on the part of every joint contractor to pay his share of the joint expense. But, when once it is established that the mere fact of being on the provisional committee does not make a party to be a joint contractor with those who act and make contracts, the whole substratum fails; there is no joint contract, and so no liability to contribute.

On these grounds we feel bound to differ from the Vice Chancellor of England, and to say that *Mr. Cottle* did not become liable to contribute to any of the expenses incurred, and the order placing him on the list must therefore be discharged. *Mr. Cottle* will have the costs of the motion before the Vice Chancellor of England.

K. BRUCE, V.C.
March 26.
LORDS COM.
July 4, 15.

In re THE DIRECT EXETER,
PLYMOUTH AND DEVONPORT
RAILWAY COMPANY, *ex parte*
ROBERTS.

Company—Winding-up Act—Contributory—Provisional Committee-man.

R. allowed his name to be published as one of the provisional committee of a projected railway company, and attended two meetings of such committee, at which the only business transacted was the appointment of a managing committee; but he never took or contracted to take any shares in the com-

pany. After some expenses had been incurred by the managing committee, the scheme proved abortive:—Held, that R. was not liable as a contributory.

The fact of being one of a provisional committee is not sufficient per se to make a person liable for the acts of such committee; he must, either expressly or impliedly, have assented to such acts.

In 1845 a project was formed for making a railway to be called "The Direct Exeter, Plymouth and Devonport Railway." In September of the same year, a circular letter was sent by the projectors to Mr. E. H. Roberts, requesting that he would become one of the provisional committee of the company. To this letter Mr. Roberts replied by a letter of the 22nd of September 1845 in these words:—"Being the owner of a set of mills and lands in the parish of Bridford near which I presume the proposed railway is intended to come, I beg to inform you in reply to your note that you may confidently reckon on my support. In proof of which you may, should you think proper, place my name on the provisional committee.—Yours, E. H. Roberts. P.S. This must be taken subject to my approval of the plans and course of the line when definitely fixed upon, and so that I shall be held free from all liabilities." No answer was sent to this letter, but the name of Mr. Roberts was put on the list of the provisional committee. On the 4th of October following, a meeting of the provisional committee was held, at which twenty-one members were present, including Mr. Roberts, and it was then resolved that another meeting should be held on the 7th for appointing a managing committee. That meeting was accordingly held, thirty-one members being present, including Mr. Roberts. He took no part in the proceedings at the meeting, and left it before any resolution was formally passed or recorded. The only resolution passed at that meeting was, that certain gentlemen who were named should be the committee of management. On the 13th of October, the committee of management entered into a contract with certain engineers for a survey of the intended line. On the 20th of October, Mr. Roberts

desired that his name might be struck out of the provisional committee, and this was accordingly done. Mr. Roberts never took or contracted to take any shares in the company. No notice of the transactions of the managing committee was sent to Mr. Roberts after his name was struck out of the provisional committee until the 27th of December 1845, when a circular of that date in the following terms was forwarded to him:—"Direct Exeter, Plymouth and Devonport Railway.—Sir, I am directed by the committee of management of this company to request your attendance, as one of the members of the provisional committee, at a special meeting to be held at, &c. on the 31st inst. to take into consideration the liabilities, and to decide on the best means of settling the claims upon the company. (Signed) T. G. Tarrant, Secretary *pro tem.*"

Mr. Roberts replied to this circular, expressing his surprise at the notice being forwarded to him, and calling attention to the terms of his letter of the 22nd of September, as to being held free from all liabilities, and to the withdrawal of his name as a provisional committeeman, on the 20th of October. He did not attend that or any subsequent meeting, until the 2nd of March 1846, when he was present merely to protest against being considered a member of the committee. Shortly afterwards Mr. Roberts was threatened with proceedings by creditors of the company, and under that pressure paid the sum of 65*l.* to the credit of the company, under protest.

An order being made for winding up the affairs of the company, the Master, under these circumstances, placed the name of Mr. Roberts on the list of contributories. A motion, by way of appeal from the decision of the Master, was then made before Vice Chancellor Knight Bruce, when his Honour delivered the following judgment.

KNIGHT BRUCE, V.C.—With deference to the Master I do not, in this particular case, arrive at the conclusion at which he has arrived. Mr. Roberts may or may not be liable to creditors of the company, creditors of the directors, or creditors of the committee or either of the committee. That I do not consider to be

a question before me. Again, it is not necessary for me to say what I should have thought of the case if the postscript of the letter of the 22nd of September had not been written; but the postscript was written. Now, that postscript I consider an integral and original part of the contract, by which and under which Mr. Roberts was associated with the persons with whom he was associated in this matter, and it is in these terms—they have been frequently read, but they are short—"This must be taken subject to my approval of the plans and course of the line when definitely fixed upon, and so that I shall be held free from all liabilities." I am of opinion that the true construction of these words is, that as between themselves, as between him and the persons with whom he was to be associated, there was to be no liability on his part. Still, however, he may have stipulated for that ineffectually. The contract, though intended by him to be conditional, may in its effect have been in law or equity absolute. That, however, is not my opinion here: I think that it was incorporated into the contract from the beginning, and must be considered as having accompanied it throughout. There can be no doubt that cases of possible difficulty might arise. One which has crossed my mind was suggested by Mr. Russell, namely, the case of every provisional committee-man having joined under a similar reservation as to the absence of liability, and an action brought against all. Then, probably there must be by law and in reason some contribution among them all in respect of that demand, although each had contracted to exclude himself from any liability. No such case, however, is brought before me, and the evidence renders it unnecessary for me, I think, to assume that this, to use a common phrase, is an exceptional case. If it were, it might be necessary to deal with it in a different manner.

With deference to the Master, I think it right, with the materials before me, not to retain this gentleman on the list, carefully confining my determination to the particular circumstances of this individual case, and to this individual case on the materials now before me.

Refer it to the Master to review his

report; the costs of all parties to be paid out of the estate.

A motion was now made, on behalf of the official manager, by way of appeal, to discharge the order of the Vice Chancellor.

Mr. J. Russell and *Mr. Roxburgh*, in support of the motion, contended, that Mr. Roberts was bound by having allowed his name to appear as one of the provisional committee—*Besley's case* (1); that as such he concurred in the election of the managing committee, who were his agents for doing all such acts as were necessary and proper for furthering the projected scheme; and that, therefore, he was liable to all expenses incurred and all contracts entered into by them previously to his withdrawal: and that the condition expressed in his letter of the 22nd of September could not protect him, as the existence of any such stipulation was unknown to the rest of the committee.

Mr. Terrell, for the respondent, contra. —Mr. Roberts came under no legal liability by the mere fact of allowing his name to be published as one of the provisional committee. The Winding-up Acts were not intended to create any new liabilities, but merely to facilitate the proceedings in enforcing existing liabilities. Mr. Roberts had no interest in the intended company, and calls can only be made in respect of an interest. If he should be held liable to contribute, how is the Court to measure the quantum of his liability? No shares have been taken by him. Even if he were liable to creditors he is not liable as a member of a partnership, for none such existed.

Mr. Roxburgh replied.

July 15.—*ROLFE, B.* (Lord Commissioner) delivered the judgment of the Court. —In this case, we think, there is no ground for the application. The only circumstance found in this case, and not existing in that which we have just decided (2), is, that Mr. Roberts attended two meetings of the provisional committee. But this makes no

(1) *Ante*, p. 362.

(2) *Cottle's case*, *ante*, p. 366.

difference in principle. The question in every case is not what meetings has a committee-man attended, but what acts has he authorized to be done? Attendance at a meeting proves in general that the party so attending is a member of the body assembled. But it proves no more. If indeed any act is done by the meeting, the circumstances may be such as to warrant the presumption that what was done was the act of every person present. Such may be the fair inference under some circumstances; it may be a very unreasonable inference in others. No one present at such meeting is bound by any resolution to which he does not, expressly or impliedly, assent. Now here it appears that, before any resolution was finally come to by the meeting of the 7th of October Mr. Roberts had left the meeting; and so the resolutions passed certainly were not his acts. Indeed, if he had concurred, all that he would have concurred in would have been in appointing the persons named in that behalf to be the committee of management; and, as was pointed out in the judgment in the Exchequer, to which we have already referred, it by no means necessarily follows from thence that the parties appointing the committee of management gave them authority to make contracts. It is not, however, necessary to discuss this; for it is certain, on the evidence before us, that Roberts did not concur in the resolution by which the committee of management was appointed. We should for these reasons have been of opinion that Mr. Roberts was not a contributory, even independently of the fact that in joining the committee he expressly stipulated that he was to incur no liability.

It was urged that this stipulation was not known to the other members, and if, without such a stipulation, he would, by merely joining the committee, have become liable to the expenses incurred, the argument arising from the non-communication of that fact to the other members might be entitled to weight. But it is certain that Mr. Roberts, when he joined the committee, supposed he had guarded himself against all risks; and this tends strongly to shew the propriety of the view taken by the courts of law of the legal position of committee-men. To hold that the mere

fact of being a committee-man makes a man responsible for others, would in effect be to say, that a qualified consent to an application necessarily amounts to or at all events subjects the party to the consequences of an absolute one. It is hardly necessary to say, that in this case the payment of 65*l.* by Mr. Roberts does not vary the case. That payment was evidently made merely *causâ pacis* and under protest. It was pressed upon us that the judgment of his Honour in this case was opposed to that of Lord Cottenham in *Besley's case* (3). But on referring to the note of the judgment there we find that Lord Cottenham expressly and studiously founds his opinion on the specialties of the case, and so cannot be taken to have decided the general question.

We are of opinion, on the grounds we have already stated, that the motion in this case must be dismissed, with costs.

WIGRAM, V.C.	}	JOHNSON v. JOHNSON. SAME v. SAME.
1849.		
Nov. 24, 26;		
Dec. 4, 12.		

Bill of Revivor—Order to revive—Proceedings during Abatement.

Suit abated after decree by marriage of one of several co-plaintiffs unknown to their solicitor in the cause, and was not revived until proceedings had been subsequently had under the decree. Upon the application of the plaintiffs, the Court declared that they were entitled to the same benefit of the proceedings since the abatement as they would have been if the suit had been immediately revived; and ordered the suit and proceedings to be carried on accordingly.

The original bill was filed in October 1839, and amended by order of the 2nd of May 1840. It stated that on the marriage of Mary Johnson (one of the co-plaintiffs) with her late husband, the sum of 1,000*l.* 3*l.* per cent. annuities was transferred into the names of two trustees, of whom the defendant (F. G. Johnson) was the survivor, upon the

(3) *Ante*, p. 362.

trusts declared thereof, by an indenture of settlement of the 21st of February 1801, for the benefit of the plaintiffs and of the defendants M. A. Johnson and J. Johnson. It charged the defendant F. G. G. Johnson with having sold out the settled stock and applied the proceeds in the purchase of a life estate in certain messuages and hereditaments, which, by indenture of the 11th of November 1835, has been conveyed in trust for him, to the defendant William Young, and that the latter had deposited the deeds relating to the purchase with the plaintiffs, by way of equitable mortgage to them for the amount of the stock thus sold out. The bill then prayed a declaration that F. G. G. Johnson was bound to replace the stock, and that the *cestuis que trust* had a lien upon the premises purchased by him; for sale thereof, if necessary; for the removal of him as trustee of the settlement; and for the appointment of a new trustee, a receiver, &c.

At the hearing of the cause, on the 6th of May 1842, a decree was taken in conformity with the prayer, directing the usual inquiries as to the children of Mary Johnson; and ordering the bill to be taken *pro confesso* as against the defendant J. Johnson. Various proceedings were had under the decree, and F. G. G. Johnson not having replaced the stock, his life interest in the premises purchased by him was sold by order of the Master, and a conveyance thereof to a purchaser executed in 1845.

On the 14th of December 1841, and before the hearing of the cause, one of the co-plaintiffs Eliza Johnson intermarried with Richard Reece, but no intimation of the marriage was given to the solicitor of the plaintiffs until November 1845. A bill of revivor and supplement was consequently filed in May 1847, to which all the defendants appeared and answered, except F. G. G. Johnson and J. Johnson: the time for their answering having expired, traversing notes were duly filed under the 52nd General Order of May 1845 (1), and copies served. In May 1848 and before replication, another of the plaintiffs, Louisa Johnson, married, and a second bill of re-

vivor was in consequence filed in February 1849, to which all the defendants appeared and answered, except F. G. G. Johnson and J. Johnson. Traversing notes in respect of the second bill of revivor were also duly filed and copies served, and after replication evidence was given in both the revived suits. F. G. G. Johnson and J. Johnson were duly served with notice of all the proceedings.

The Master had not made his general report, and the plaintiffs now asked for a decree that the suit might be revived and put in the same plight and condition as the same was in at the time of the marriage of Eliza Reece, and that the plaintiffs might have the same benefit of the decree and all other proceedings since her marriage as they would have had if the suit had been revived immediately after the marriage and before any further proceedings had been taken; or that such of the orders and proceedings as might be for the benefit of all parties might be adopted and confirmed by the decree of the Court, and that for such purpose all necessary inquiries and directions might be made and given.

Mr. A. Gordon appeared for the plaintiffs; and—

Mr. A. Hobhouse, for the defendant, M. A. Johnson.

The defendants F. G. G. Johnson and J. Johnson did not appear at the hearing.

Dec. 12.—WIGRAM, V.C. made a decree to the following effect:—Declare that the plaintiffs are entitled to have the same benefit of the proceedings which have been had in the original cause of *Johnson v. Johnson*, since the 14th of December 1841, when the original suit became abated by the marriage of Eliza Reece, late Eliza Johnson, with the plaintiff Richard Reece, and also in the secondly-mentioned suit of *Johnson v. Johnson*, as they would have had previously to such proceedings if a bill of revivor had been filed and an order to revive the said original suit had been duly obtained.—Order and declare that the said suit and proceedings be carried on accordingly.—Reserve costs of this suit in like manner as the same are reserved by the said decree in the original suit.—Liberty to apply.

(1) Ord. Can. 304; s. c. 14 Law J. Rep. (N.S.) Chanc. 289.

K. BRUCE, V.C. }
 July 10. } PIKE v. BARBER.

Parties—Next-of-kin.

Suit by plaintiffs for the administration of the estate of A, an intestate. The plaintiffs claimed to be the next-of-kin of A, as being the children of B, a sister of A, but stated that B. had had other children, C. and D, who, by reason of illegitimacy, had no interest. The administrator, by his answer, submitted that C. and D. ought to be made parties. The cause being set down on an objection for want of parties, the objection was ordered to stand for the hearing.

The plaintiffs, by their bill, stated that they, as the children of the marriage of the only sister of the intestate in the cause with Mr. Eyres, were the next-of-kin of the intestate, and prayed for the usual account of his personal estate. The bill, however, charged that there were in existence certain children, the offspring of a connexion formed by Mrs. Eyres with another person previously to her marriage with Mr. Eyres, but stated that in that case there had been no marriage. These persons were not made parties to the suit.

The administrator, by his answer, stated that he was ignorant of the circumstances stated in the bill, and "submitted to the Court" whether the persons who were stated to be the children of Mrs. Eyres before her alleged marriage with Mr. Eyres, ought not to be made parties to the suit. There was, however, no statement that such persons "claimed any interest."

The cause was set down to have the opinion of the Court taken as to the objection for want of parties appearing in the pleadings.

Mr. Elderton, for the plaintiffs.

Mr. R. Palmer and *Mr. John Barber*, for the defendant, contended that the persons in question ought to be made parties to the suit, in order that they might assert or give up their claims to be the next-of-kin, and that the assets could not be safely administered in their absence.

KNIGHT BRUCE, V.C. said that, as there

was no statement in the answer that the persons in question had made any claim, he thought that he could not direct them to be made parties. The objection must stand for the hearing. He thought, however, that notice of the proceedings ought to be given by the administrator to such parties.

K. BRUCE, V.C. }
 August 1. } *In re BUTTERFIELD.*

Infant—Guardian.

Order made that the dividends of a very small sum of stock, belonging to six infants, should be paid to their guardian until the youngest should attain twenty-one, or further order.

The six infant children of Mr. Butterfield, deceased, were entitled to the sum of 300*l.* 3*l.* per cent. consols, which had been carried over to their account. A guardian had been appointed by the Court.

A petition was now presented, praying that the dividends of this stock might be paid to the guardian of the infants until the youngest child should attain twenty-one, or further order.

Mr. Simpson, for the petition.

KNIGHT BRUCE, V.C. said, he doubted whether he could make such an order.

Mr. Simpson said, that the proposed order would not prevent any child, on attaining twenty-one, from obtaining a transfer of his share, and that it might be a great advantage to the children that they should have the opportunity of getting the whole sum out by one order.

KNIGHT BRUCE, V.C. said, that he would not make such an order with respect to a sum of considerable amount, but that, considering the smallness of the sum in question, he might venture, "to do a great right, to do a little wrong," and that he would make the order.

L.C.
Jan. 19, 21, 22; { MACINTOSH v. THE GREAT
June 4. { WESTERN RAILWAY
COMPANY.

Railway Company—Contractor—Fraud—Demurrer.

A bill filed against a railway company, their secretary and engineer, stated that the plaintiff had contracted with the company to execute certain works; and that the company had agreed to pay for them in a specified manner, with a proviso, that the works should not be considered as executed unless the engineer of the company should certify to that effect; and that the engineer, upon notice, should proceed to examine the works, and, if properly executed, should certify the same, and that thereupon the plaintiff should be entitled to recover; that the works had been completed properly, but that the engineer, acting under the direction of and in collusion with the company, refused his certificate. The bill prayed a declaration that such refusal was a fraud upon the plaintiff, and for an account and payment of the sums due to him. All the defendants put in a general demurrer. Upon appeal, the decision of the Court below overruling the demurrers was affirmed.

This was an appeal from the decision of Knight Bruce, V.C. overruling a general demurrer put in by the company. The statements of the bill and the relief sought are set out in the report of the case on the original hearing, 18 *Law J. Rep.* (N.S.) Chanc. 94.

Mr. Bethell, Mr. Bacon and Mr. Stevens appeared in support of the appeal.

Sir Fitzroy Kelly, Mr. J. Russell and Mr. Lloyd appeared in support of the order below.

JUNE 4.—THE LORD CHANCELLOR.—I have examined with great care the statements in the very voluminous bill in this case, and have come to the conclusion that the Vice Chancellor Knight Bruce's judgment is correct; and in affirming it I do not think that any of the decisions upon similar subjects are in the least disturbed. It will probably be extremely difficult for a court of equity to do justice to the

plaintiffs, according to the case made by the bill; but there does not appear to be any possibility of a court of law doing so. What might be the effect of such a state of things if this impossibility had arisen from the act or conduct of the plaintiffs, it is not necessary to consider; because it is, I think, sufficiently stated and shewn that it not only exists in this case, but that it has arisen from the conduct of the defendants, not adopted probably from any fraudulent intention or schemes, but now made the instrument of fraud, if it should prevail to prevent the plaintiffs from recovering payment of what is justly due to them.

The subject-matters upon which the plaintiffs seek the assistance of equity are various, but in most of them the same ground exists; and, as it is sufficient for the present purpose to see that a case is made for some relief, I purpose confining myself to that point which is common to many of the subject matters of the bill, and as to which the facts stated, if true, are, I think, sufficient to entitle the plaintiffs to the assistance of this Court. It is true that the specification and contract constitute a relationship between the plaintiffs and the defendants which, if correctly acted upon, would have given to the plaintiffs a legal right, and a legal right only, to the benefits they claim by this bill; but if the facts stated in the bill are such as, if true, deprive the plaintiffs of the means of enforcing such legal rights, such facts having arisen from the conduct of the defendants or of their agent, and so recognized by the specification and contract, and now used for the fraudulent purpose of defeating the plaintiffs' claim altogether, the defendants cannot resist the plaintiffs' claim in equity, upon the ground that their remedy is only at law, nor is it any answer to shew that, if the plaintiffs cannot get at law what they contracted for, they may obtain compensation in damages. It is no answer to a bill for specific performance, that the plaintiff may bring an action for damages for a breach of the contract, or in a proper case file a bill for recovery of specific chattels, that damages may be recovered in trover. The language of pleading is, not that the plaintiff has no remedy, but no adequate remedy save in a court of equity.

It is, therefore, no answer in the present case for the defendants to urge that if they or their agents have been neglectful of what they undertook to do, by which the plaintiffs have suffered, they may be liable in damages to the plaintiffs. They contracted for a specific thing, and are not bound to take that or something in lieu of it, if such other thing be not what this Court considers as a fair equivalent. I do not therefore consider that any answer is given to the plaintiffs' right to file a bill in this court, by shewing that the ground upon which they claim the right so to do, namely, the being barred of their legal remedy by the conduct of the defendants, may subject them to damages at law. It was indeed urged that the plaintiffs' remedy at law was not affected by the facts alleged in the bill, because it was contended that a condition precedent, the performance of which was rendered impossible by the conduct of the defendants, could not affect the plaintiffs' right, upon the authority of *Hotham v. the East India Company* (1); but the present is not a contract dependent upon a condition precedent, but the matter to be performed, and the performance of which has been prevented by the conduct of the defendants, is part of and of the essence of the contract itself, and without the performance of which it is provided that no right under the contract shall arise. The case made by the bill in this respect varies according to the facts, but the principle is included in all extra work, for instance, the payment of which was to be regulated by periodical admeasurements, and a fixed rate of charge cannot now be so regulated, being covered and concealed by other works made under the directions of the agent of the defendants; the contract, therefore, though capable of being performed after a due investigation, cannot be the subject of an action upon the terms of it. Similar observations apply as to other parts of the case, such as the works not being completed within the prescribed time, and the causes which led to that omission.

It appears to me, therefore, that this is clearly a case in which the plaintiffs cannot obtain what they are entitled to at

law, and that their inability to do so has arisen from the acts of the defendants or their agent; and whether such acts arose originally from any fraudulent motive or not, I think that to use them for the purpose of defeating the plaintiffs' remedy would constitute a fraud which this Court will not permit the defendants to avail themselves of, and that therefore they are precluded, according to the statements in the bill, from raising the objections they rely upon to the plaintiffs' equity, and that there is sufficient allegation of that of which the fraud consists. The demurrer was, therefore, I think, properly overruled, and this appeal must be dismissed, with costs.

K. BRUCE, V.C. } *Ex parte* BENNETT.
July 25, 27. }

Infant—Legacy paid into Court under the 36 Geo. 3. c. 52.—Motion for Transfer.

An application for a transfer of consols purchased by means of a legacy paid into court under the 36 Geo. 3. c. 52. may be made on motion.

By the 36 Geo. 3. c. 52. s. 32. it is enacted that, where, by reason of the infancy of a legatee, an executor cannot pay a legacy, it shall be lawful for the executor to pay the amount into the Bank of England, such money to be laid out in consols, which shall be afterwards transferred to the legatee, "on application to the Court of Chancery, by petition or motion in a summary way."

Under this act, a legacy of 40*l.* had been paid into the Bank for the benefit of Elizabeth Bennett, and an application for a transfer was now made, on motion, by her, on her coming of age.

Mr. Pownall, for the motion.

Knight BRUCE, V.C. said that he had an impression that, according to the practice of the Court, such application could be made by petition only, and directed that the matter should stand over, in order that the practice should be inquired into.

(1) 1 Term Rep. 638.

Upon a subsequent day, the Registrar in Court stated that, according to the practice, such applications might be made by motion, and

KNIGHT BRUCE, V.C. made the order accordingly.

K. BRUCE, V.C. { *In re CANN'S ESTATE.*
August 1. { *In the matter of the NOR-*
 FOLK RAILWAY COM-
 PANY'S ACTS.

Railway Company—Lands Clauses Consolidation Act, s. 69.—Copyhold Land.

The 69th section of the Lands Clauses Consolidation Act does not authorize the investment of the purchase-money of a freehold estate in copyhold property—semble.

But, upon the report of the Master that such an investment is fit and proper, and for the benefit of the persons interested, the Court will, in certain cases, sanction such an investment.

A testator devised a freehold estate to John Ploughman for life, with remainder to trustees on the usual trusts for sale, with a direction to divide the purchase-money among certain specified persons. This property was taken by the above-mentioned railway company under one of their acts, which was passed after the Lands Clauses Consolidation Act (1), and the purchase-money was paid into court. A reference was made to the Master, on the petition of the tenant for life, to inquire "whether it was fit and proper, and for the benefit of the petitioner and the other parties interested," that a part of the purchase-money should be laid out in the purchase of the freehold and copyhold lands mentioned in a certain proposed agreement. The Master made his report, whereby he found that all the persons interested in the purchase-money were ascertained, and were of age, but that two of them were married women; and found also that the agreement was fit and proper, and for the benefit of the persons interested.

(1) 8 Vict. c. 18.

A petition was now presented praying for a confirmation of the Master's report and consequential directions, and praying also that the purchase-money and the fines and fees attending the admission to the copyhold property might be paid out of the money then in court.

Mr. Toller, for the petition.

KNIGHT BRUCE, V.C. said, he doubted whether the act authorized the investment of purchase-money arising from a freehold estate in the purchase of copyhold property.

Mr. Toller referred to the 69th section of the Lands Clauses Consolidation Act, whereby it is directed "that the money paid into the Bank shall be applied in the purchase of other lands to be conveyed to the same uses as the lands in respect of which such money shall have been paid stood settled"; and to the interpretation clause, which enacted that the word "lands" should extend to "messuages, lands, tenements and hereditaments of any tenure."

KNIGHT BRUCE, V.C. said that if any authority were produced he would act upon it; but that he would not be the first to put that interpretation on the act. He thought, however, that, if there was a report of the Master or proper evidence that the purchase was for the benefit of the married women, he might make the order.

Mr. Toller called the attention of His Honour to the language of the reference to the Master, who had reported that it was for the benefit of all persons interested. He could also state that the Master's attention had been called to the point.

Mr. B. L. Chapman, for the company.

KNIGHT BRUCE, V.C. said, that upon the last ground stated by *Mr. Toller* he would make the order.

M.R.
1849.
Nov. 12, 13, 14.
1850.
Jan. 12.

{ BAILEY v. THE BIRKEN-
HEAD, LANCASHIRE,
AND CHESHIRE JUNC-
TION RAILWAY COM-
PANY.

*Railway Company—Internal Management
—Calls, Jurisdiction of Equity to restrain
—Shareholders—Preference of one Class to
another—Demurrer—Parties—Pleading.*

Under an act of parliament the capital of a railway was converted into shares of the nominal value of 27l. 10s., 22l. and 31l. upon which unequal sums were due, and upon which profits were payable in proportion to the money actually paid. A bill was filed by a holder of shares of 31l. on behalf of himself and the other holders of such shares, alleging that the directors had formed a scheme to conduct the affairs of the company without regard to the general benefit of the shareholders, but for the benefit of the holders of shares of 27l. 10s. and 22l.; and that in furtherance of such design they had made a call of 10l. on the holders of shares of 31l., and that they had done various other acts stated in the bill to intimidate and induce the shareholders to consent to terms which would give an advantage to the holders of shares of 27l. 10s. and 22l. It was also alleged that the call was not required for the works which the company had power to make, and it prayed for an inquiry to ascertain how much of the 10l. was required for the purposes of the company, and for an injunction to restrain proceedings to enforce payment of more of such calls than should be found necessary. The bill also alleged that the plaintiff and other holders of 31l. shares had not paid the call, but that some had:—Held, upon a demurrer, by the company for want of equity and for want of parties, that, as the bill contemplated a continuance of the company, the Court could not entertain jurisdiction and assume to interfere in the internal management of the company, and that the plaintiff was not entitled to relief on this bill.

Held, also, that the bill was defective for want of parties, as the plaintiff sued, as well for shareholders who had paid, as for those who had not paid, and also because the bill did not allege that the holders of other shares were fully represented by the defendants,

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and the demurrer was allowed, and leave to amend the bill refused.

The clauses in a railway act upon which a plaintiff intends to rely, should be stated in the bill; and, if omitted in the bill cannot be referred to, upon demurrer, although the act is a public one.

This bill was filed by Joseph Bailey on behalf of himself and all other holders of shares of 31l. each in the Birkenhead, Lancashire, and Cheshire Junction Railway Company, except such of the defendants as were holders of such shares, against the said company and against James Bancroft and the other directors thereof. The bill stated an act, passed in 1837, 7 Will. 4. & 1 Vict. c. cvii., authorizing the construction of the Chester and Birkenhead Railway, with a capital of 250,000l. divided into 5,000 shares of 50l. each, and an act, passed in 1840, 3 & 4 Vict. c. ii., authorizing the raising of 125,000l. additional capital to complete the works of the company; that the whole capital of 250,000l. except about 4,000l., was raised by shares of 50l. each issued at par; that under the act of 1840, the company created 5,000 shares of the nominal value of 25l. each, 4,959 of which were issued at a discount of 5l. each; that in 1842 the company, under the act of 1840, created 7,500 shares of the nominal value of 50l. each, 7,415 of which were issued at 17l. per share, being a discount of 33l. per share; that, in 1845, another act, 8 & 9 Vict. c. xcix., was passed, authorizing the Chester and Birkenhead Railway Company to extend the railway and to raise a capital of 300,000l. for that purpose, and that the company, in pursuance of this act, created 15,000 shares of 20l. each, and issued 14,780 of such shares at par. The bill then stated an act, passed in 1846, 9 & 10 Vict. c. xci., authorizing the construction of the Birkenhead, Lancashire and Cheshire Junction Railway with a capital of 1,500,000l., to be divided into 45,000 shares of 33l. 6s. 8d. each, which shares were issued at par, and that all the money under the acts of 1837 and 1840 was fully called up. The bill then stated an act, passed in 1847, 10 & 11 Vict. c. ccxxii., amalgamating the Chester and Birkenhead Railway with the Birkenhead,

Lancashire and Cheshire Junction Railway, which enacted that all the real and personal estate of the Chester and Birkenhead Railway Company, and all their rights and powers, should be vested in the Birkenhead, Lancashire and Cheshire Junction Railway Company, and (sect. 12,) that the latter company should create such a number of shares, or such an amount of stock in that company, as would admit of shares or stock in the same company being allotted to holders of shares in the Chester and Birkenhead Railway Company, in lieu of shares held by them in the capital of that company, according to the scale and in the proportions therein mentioned; and by section 13. it was enacted, that every person who, at the time of the passing of this act, held 50*l.* shares in the Chester and Birkenhead Railway Company should be entitled, in respect of each such share, to two shares in the capital of the Birkenhead, Lancashire and Cheshire Junction Railway Company, of the nominal value of 27*l.* 10*s.* each, without being required to pay any sum in respect thereof, and that the holders of 25*l.* shares in the Chester and Birkenhead Railway Company should be entitled to the like number of shares in the Birkenhead, Lancashire and Cheshire Junction Railway Company, of the nominal value of 27*l.* 10*s.* each, without being required to pay anything in respect thereof, and that the holders of 20*l.* shares in the Chester and Birkenhead Railway Company should be entitled to the like number of shares in the Birkenhead, Lancashire and Cheshire Junction Railway Company, of the nominal value of 22*l.* each. And (sect. 14) the shares of 27*l.* 10*s.* each were declared to be fully paid up, except for so much money as might have been called for by the Chester and Birkenhead Railway Company, and not paid up on the shares of 50*l.* and 25*l.* each in that company; but it was subsequently stated in the bill that the full amount of those shares had been called for; and as to the shares of 22*l.* each, on which 6*l.* 10*s.* only had been called up, powers were given to make and enforce calls for the purpose of calling up the unpaid amount thereof to the extent of 20*l.* It also enacted (sect. 17.) that the proprietors of the several shares in the capital of the Birkenhead, Lan-

cashire and Cheshire Junction Railway Company, which were thereby vested in the persons who were proprietors of shares in the Chester and Birkenhead Railway Company should be entitled in respect thereof as follows, that is to say, from the 1st of January 1847, to the 1st of January 1849, to interest on the nominal amount of the shares vested in them, at the rate of 5*l.* per cent. per annum, subject to deduction as to any sums which the Birkenhead, Lancashire and Cheshire Junction Railway Company should be entitled to call for on the 22*l.* shares, and from the 1st of January 1849 to the 1st of January 1850, to interest on the nominal amount of their shares at the rate of 6*l.* per cent. per annum on such payment, and subject to such deduction as aforesaid; and (section 18.) preference was to be given to the proprietors of these shares in respect of their interest over the other shareholders of the company. By the 20th section of the act, after reciting that the capital authorized by the act of 1846 to be raised by the Birkenhead, Lancashire and Cheshire Junction Railway Company, in shares of 33*l.* 6*s.* 8*d.* each, was 1,500,000*l.*; and, reciting that the amount which would be paid to the Chester and Birkenhead Railway Company as premiums on their shares, was 105,000*l.*, it was enacted that it should not be lawful for the Birkenhead, Lancashire and Cheshire Junction Railway Company to raise more capital under the powers of their act than 1,395,000*l.*, and that the nominal value of each share should be reduced from 33*l.* 6*s.* 8*d.* to 31*l.* And it also enacted (sect. 21.) that from and after the 1st of January 1850, the proprietors of the 27*l.* 10*s.* and 22*l.* shares should be entitled to share the profits of the undertaking *pari passu* with the 31*l.* shareholders, in proportion to the amount paid up by them.

The bill stated that a call of 1*l.* 5*s.*, in respect of the 31*l.* shares, and a call of 3*l.* in respect of the 22*l.* shares, had been made, and that such calls were made payable in 1847, and that in 1848 another call of 2*l.* 5*s.* was made in respect of the 31*l.* shares; and that subsequent to such calls, and before November 1848, the defendant, James Bancroft, who was the chairman of the Birkenhead, Lancashire and Cheshire

Junction Railway Company, and such of the directors of the same company as were still directors formed a scheme of conducting the affairs of the company without regard to the general benefit of the shareholders, and in such manner as to promote their own individual interests, and to benefit the holders of shares of 27*l.* 10*s.* and 22*l.*, to the prejudice of the holders of shares of 31*l.*, and that they determined before proceeding to carry their design into execution, that such of them as were holders of shares of 31*l.* should sell such shares, and purchase shares of 27*l.* 10*s.* and 22*l.*, and that they also determined to make such arrangements so as to render it certain that the majority of the directors should be holders of shares of 27*l.* 10*s.* and 22*l.* The bill then stated that the directors, intending to depreciate the shares of 31*l.* caused some intimation to be given to dealers in shares at Manchester and Liverpool of an intention to abandon a considerable part of the railway authorized by the act of 1846, though they intended to make full calls upon such shares; and that at a meeting held on the 25th of November 1848, they proposed terms for the relinquishment or modification of the interest of the holders of shares of 31*l.*, which were alleged to be injurious to them, and were dissented from by the plaintiff and divers other holders of shares; notwithstanding which the directors, in February 1849, introduced a bill into the House of Commons to authorize the company to abandon a part of the line, to form a new line to join the London and North-Western Railway, to alter the mode of constructing part of their works, and to alter their tolls, and for other purposes; and it proposed to enable them to abandon parts of the railway and works which they had obtained power to make, and for a corresponding reduction in the amount of the capital of the company, and also for a modification of the interests of the holders of the 31*l.* shares, which it was proposed to cancel, and in lieu thereof to create 106,000 new shares, of the nominal value of 7*l.* each, upon which 1*l.* 5*s.* was to be considered as paid, and to give the proprietors of the 31*l.* shares an equal number of such new shares in lieu thereof.

The bill also stated a petition against this bill by certain holders of shares of 31*l.*

and a consequent alteration in the proposed enactments, and the final withdrawal of it from parliament upon the company objecting to clauses respecting the tolls which the parliamentary committee proposed to introduce; and it alleged that while the bill was before parliament, and when the intended opposition of the petitioners against it was known, the directors, on the 10th of February 1849, in order to intimidate the holders of the 31*l.* shares, and to cause them to abstain from opposing the bill, made a call of 10*l.* per share on the 31*l.* shares, one half to be paid in March, and the other half in April 1849.

The bill also alleged that the call of 10*l.* was not required for the execution of any of the works, which at the time when the call was made were being or were intended to be executed; that on the 26th of June 1849, the period of three years from the passing of the act of 1846 expired, and the company not having purchased any of the lands required for making their branch railways from Hooton to Helsby and from Lower Walton to Heaton Norris, had lost the power of constructing the same, and had, in fact, abandoned them; that the only portions of the railways authorized by the act of 1846, which they still had power to make, extended from Chester to Helsby and from Helsby to Lower Walton, and comprised between sixteen and seventeen miles; that the cost of making the railways which they had abandoned would have exceeded 813,000*l.*, that the abandonment had rendered it unnecessary to raise it, but if that sum were appropriated among the 45,000 shares of 31*l.* each, it would give the sum of 18*l.* and upwards as the amount of the proper reduction of such shares, and that it thereby appeared, as the fact was, that the monies raised and to be raised in respect of every such share, ought not to exceed the sum of 13*l.* per share, and that sums equal to 10*l.* per share having, previously to the commencement of 1849, been deposited upon, or called up in respect of the shares of 31*l.*, the sum of 3*l.* per share was the utmost total amount of any call or calls which could subsequently have been properly made in respect of such shares; that the plaintiff was the owner of 487 shares of 31*l.* each, and the directors, although they knew that the call of 10*l.* was not required, never-

theless, in pursuance of their scheme and design, and for the fraudulent purpose of injuring and oppressing the plaintiff and the other shareholders on whose behalf he sued, and of procuring a forfeiture of their shares for the benefit of the other shareholders, persisted in enforcing the call. That the holders of certain of the 31*l.* shares had, in consequence of the defendants threatening to bring actions against them for the recovery of such call, paid the same, but had, at the same time, protested against such call as improper and unjust, and had insisted on their right to have the same repaid; that the plaintiff, and divers other of the shareholders, on whose behalf he sued, had refused to pay such call.

The bill then charged that by reason of the arrears of calls on the 31*l.* shares, the holders of 27*l.* 10*s.* and 22*l.* shares, capable of voting at meetings of the company, had a majority of votes over the holders of 31*l.* shares capable of voting thereat, and that the obtaining of such majority for the holders of 27*l.* 10*s.* and 22*l.* shares was one of the objects of the defendants, and that in consequence of the existence of such majority most of the holders of shares of 31*l.* had considered it useless to attend, and had not attended any meetings of the company since August 1848, and that the proceedings of all subsequent meetings had been wholly controuled by holders of shares of 27*l.* 10*s.* and 22*l.*; that the monies to be raised by means of the 31*l.* shares were authorized by parliament to be raised for the purpose of constructing works authorized by the acts of 1846 and 1847, and were not by any of the said acts authorized to be raised or applied for paying off monies borrowed on mortgage by the Chester and Birkenhead Railway Company, but that the defendants threatened and intended so to apply the same; that the defendants alleged that they had not abandoned the formation of the portions of railway from Lower Walton to Heaton Norris, and from Hooton to Helsby, but the bill charged the contrary to be the truth, and that the company had not purchased or taken any steps to purchase any of the lands required for making such portions of railway, and that it was wholly impracticable for the company to make the same without another act.

The bill also charged that the number of

holders of 31*l.* shares was so great, and their rights and liabilities so subject to change by death or otherwise, that it would not be possible without the greatest inconvenience to make them parties, but that the interests of all such shareholders, except such (if any) of the defendants as were holders of such shares, were identical with the interests of the plaintiff in respect of the matters in the bill mentioned, and that all such shareholders, except as last aforesaid, had a common interest in obtaining, and, in fact, consented and agreed to the relief thereby prayed.

The bill also contained a similar charge with respect to the number of holders of 27*l.* 10*s.* and 22*l.* shares.

The bill then prayed that it might be ascertained under the direction of the Court, whether any and what part of the call of 10*l.* per share was required for any of the purposes to which the monies to be raised by means of the shares of 31*l.* each were lawfully applicable, and that the defendants, their solicitors and agents, might be perpetually restrained by injunction from commencing or prosecuting against the plaintiff, or any of the shareholders on whose behalf he sued, any action or other proceedings at law for enforcing the payment of any part of such call, other than such part as might be so required, and from declaring, confirming, enforcing, or otherwise acting upon any forfeiture of any of the shares of 31*l.* each in respect of any part of such call, other than such part as might be so required, and that any part of such call which had been paid by any of the shareholders on whose behalf the plaintiff sued, other than such part as might be so required, might be repaid to such shareholders, and that in the mean time and until the part so required of such call should be ascertained by the direction of the Court, the defendants, their solicitors, attornies, and agents might be restrained by injunction from commencing or prosecuting any action or other proceedings at law against the plaintiff or the shareholders on whose behalf he sued, or any of them in relation to the same call, or any part thereof, and from declaring, confirming, enforcing, or otherwise acting on any forfeiture of any of the shares of 31*l.* each in respect of the same call, or any part thereof, and that the defendants,

their solicitors, attorneys, and agents might be perpetually restrained from making any further call on the holders of shares of 31*l.* each, and from commencing or prosecuting any action or other proceeding at law against the plaintiff or the shareholders on whose behalf he sued, or any of them, in relation to any such further call, or any part thereof, and also from declaring, confirming, enforcing, or otherwise acting on any forfeiture of any of the shares of 31*l.* each in respect of any such further call, and also from applying any of the monies received or to be received in respect of the shares of 31*l.* each towards paying the monies borrowed by the Chester and Birkenhead Railway Company, or any part thereof, or for any other purpose to which the monies so received, or to be received, were not properly applicable.

To this bill the company put in a demurrer for want of equity and for want of parties, because a sufficient number of holders of shares of 27*l.* 10*s.* and 22*l.*, besides the directors, had not been made parties to represent the interest of the remainder of such shareholders.

Mr. Turner and *Mr. Glasse*, in support of the demurrer.—The form of this bill is novel. It states that an undue preference is given by the directors to two out of three classes of shareholders. It also states that they are making a call upon the third class greater than necessary, considering the state of the railway and the abandonment of a part. The plaintiff, therefore, who is a shareholder of the third class, requests the Court to ascertain whether any and what part of the call is required to be raised. But the Court cannot intermeddle with the internal arrangements of the company; and in the absence of all the shareholders it cannot say what call shall be made for each particular purpose, or what each class shall contribute. The Court also cannot know what arrears upon calls are outstanding, what debts exist, or what works are to be constructed; it can know nothing of the prices to be paid, or the amount to be expended. It is similar to *Evans v. Stokes* (1), where, if the object is to have the affairs of a joint-stock

company wound up and settled, it was held that all the shareholders must be parties. The law regulating partnerships must apply to this company. The plaintiff alleges that the parties whom he represents have not attended the meetings of the company since August 1848, as they knew there would be a majority against them: but they had powers to exercise and duties to discharge at those meetings; these they neglected, and now they ask the Court to exercise them, and to assist in the management of the company during its existence: but this the Court will not do; it is altogether impracticable, as the parties themselves must exercise the powers which have been conferred upon them—*Waters v. Taylor* (2), *Const v. Harris* (3). There is also a misjoinder of parties: some of the shareholders have paid up the calls made upon their shares. It is alleged that such payment was made under protest; but that is immaterial, as they had paid the calls, and consequently cannot have a common interest with those shareholders who have not paid; but still the plaintiff asks for an injunction on their behalf to restrain the directors from enforcing the call upon them. But as all the acts of the directors have been kept within the powers conferred upon them by parliament, they are the acts of the majority of the shareholders, and bind the minority the same as if they were partners trading under an ordinary deed of partnership.

Mozley v. Alston, 1 Phill. 790; s. c. 16 Law J. Rep. (n.s.) Chanc. 217.

Foss v. Harbottle, 2 Hare, 461, 497.

Lord v. the Copper Miners Company, 1 Hall & Twells, 85; s. c. 2 Phill. 740; 18 Law J. Rep. (n.s.) Chanc. 65.

Richardson v. Hastings, 7 Beav. 301; s. c. 13 Law J. Rep. (n.s.) Ch. 129.

Yetts v. the Norfolk Railway Company, 5 Rail. Ca. 487.

Harmer v. Gooding, 13 Jur. 400.

Mr. Roundell Palmer and *Mr. F. H. Goldsmid*, for the plaintiff.—The material consideration is, whether the bill states a case on which the Court can give relief.

(1) 1 Keen, 24; s. c. 5 Law J. Rep. (n.s.) Chanc. 129.

(2) 15 Ves. 10.

(3) Turn. & R. 496.

First, then, is any wrong stated upon the bill? Secondly, can this Court apply any remedy? And thirdly, is there any other remedy of which the plaintiff has debarred himself by his acts? The directors by obtaining a majority of votes cannot do what they please; neither can they make calls from a certain class of shareholders for fraudulent purposes, because the matter is one of internal arrangement. The various classes of shareholders are by no means upon the same footing. The interests of the three classes of shareholders are distinct as to profits. The shareholders of the 27*l.* 10*s.* and 22*l.* shares are entitled to the profits of the entire transactions, in proportion to the amounts of their shares, the 31*l.* shareholders only in proportion to the monies paid, amounting to 10*l.*, while the calls made upon the 27*l.* 10*s.* shares were none, upon the 22*l.* shares 6*l.* 10*s.*, and upon the 31*l.* shares 21*l.* To those who have paid their calls no injury can arise, as they are entitled to a full participation of profits. There are other clauses in the 10 & 11 Vict. c. ccxxiii., which may be referred to, though they are not set out in the bill.

[*Mr. Turner* objected to their being read.]

[*The MASTER OF THE ROLLS.*—In arguing a demurrer the statements in the bill must be taken as true; and the rule is, that you must look at them alone. The act being a public act makes no difference. Such parts, therefore, as the plaintiff intended to use must be stated in the bill. If that is not done, I cannot allow clauses not set out to be read, if any objection is made by the defendant.]

Mr. Roundell Palmer.—The case made by the bill states that the directors had formed a scheme to defraud the 31*l.* shareholders by a fraudulent exercise of legal powers, by putting themselves in the position of holders of shares of 22*l.* and 27*l.* 10*s.*; that they were in private communication with the share-market, and were attempting to make the legislature parties to the fraud. The affairs of the company were conducted upon the principle of fraudulent partiality. They had introduced a bill into parliament, the title of which gave no indication of its purpose; its effect was to confiscate the 31*l.* shares; the very proposal evidenced a design to

favour other classes of shareholders. The bill did not preclude the plaintiff from insisting that a part of the line had been abandoned. It was also stated that the call of 10*l.* per share upon the 31*l.* shares was made to intimidate the holders. It was not required for the execution of the works; those from Chester to Birkenhead had been executed, and the money raised had produced its fruits. The money authorized to be raised by the Junction Railway was intended to make the whole of the forty-six miles of line. The bill also shews that the directors did not consider it necessary to raise the whole, as it contained a provision for reducing the capital. The call, therefore, which the directors had made operated in aid of the fraudulent purpose, by depreciating the shares and excluding the holders from the benefits to be derived from them; it will not apply to future calls; the cost, therefore, of the part abandoned ought to be taken off the 31*l.* shares to equalize the proportions. The majority at the general meetings was by this bill shewn to be secured, by the conduct to this class of shareholders. The amalgamation clause contained a provision, that the mortgagees of the Chester and Birkenhead Railway should have no greater security than they had before. *Dummer v. the Corporation of Chippenham* (4) was in principle similar to this. The discretionary powers given to the directors cannot be exercised for corrupt purposes, and no power can be secured to two classes of shareholders to authorize the directors to do illegal acts—*Colman v. the Eastern Counties Railway Company* (5), and *Cohen v. Wilkinson* (6). It is also necessary to consider whether there is any impediment to the interference of this Court. In the first part of the case there is no difficulty which the Court will not surmount; the Court can ascertain the sum to be raised, and it can apportion it amongst the shareholders. The powers of this Court are sufficiently extensive to manage an opera house, and to compel a company to execute buildings—*Storer v. the Great Western Railway*

(4) 14 Ves. 245.

(5) 10 Beav. 1; s. c. 16 Law J. Rep. (N.S.) Chanc. 73.

(6) 1 Hall & Twells, 554; s. c. 1 Mac. & Gor. 481; 18 Law J. Rep. (N.S.) Chanc. 378, 411.

Company (7). The plaintiff also submits to pay all calls properly made. It is also necessary to consider whether any remedy was afforded by the general meetings. The plaintiff was not one who abstained from attending; there was no notice of the call until the general meeting, and such meetings cannot annul calls made by the directors. A majority cannot alter the rights of shareholders any more than it could alter the purpose of the company. The principle is the same—*In re the Vale of Neath Brewery Company ex parte Morgan* (8), and the concurrence in an illegal act will not prevent its being complained of—*Preston v. the Grand Collier Dock Company* (9), and no concurrence of the whole body of shareholders can authorize the directors to make a call for purposes not sanctioned by their acts of parliament. The Court also will not impute to shareholders an acquiescence in the acts of the directors as in other cases of partnership. Had the shareholders then any subsequent remedy? If they paid their calls, they endangered their protest by attending meetings. By the Companies Clauses Consolidation Act, 8 Vict. c. 16. s. 90, the powers of the company were to be exercised by the directors, subject to the controul of general meetings; but general meetings had no retrospective power over any call previously made—*The Exeter and Crediton Railway Company v. Buller* (10). The order for calling the general meeting should have been to consider whether the bill in parliament should be proceeded with: if therefore a bill is filed merely to restrain a future act, the defendants should shew why a general meeting was not called. The principle of the act could be made valid by a majority, as a shareholder could not sue. But allowing that the act, being a future act, could not be made valid, it must be shewn that the shareholders could not have had any remedy. As to the objection, that the 27*l.* 10*s.* and 22*l.* shares are not suffi-

ciently represented, the directors are holders of such shares—*Apperly v. Page* (11); and as to the other shareholders, the bill alleges that they are identified in interest with the other defendants, who are all holders of shares. The same objection has been raised but did not prevail—*Colman v. the Eastern Counties Railway Company, Milbank v. Collier* (12), *Wilson v. Stanhope* (13). In *Harmer v. Gooding* personal relief was sought.

Mr. Turner, in reply.

Jan. 12.—THE MASTER OF THE ROLLS
—The case which the plaintiff makes is, that by an act of parliament passed in 1847 the capital of a railway company, incorporated with the Birkenhead, Lancashire and Cheshire Junction Railway Company, became vested in that company on the purchase of the shares. Such shares were made to consist of three classes, namely, of shares of the nominal value of 27*l.* 10*s.* in respect of which nothing is due, shares of the nominal value of 22*l.* each in respect of which 6*l.* 10*s.* is due, and shares of the value of 31*l.* each in respect of which 21*l.* is due upon each from the holders. The different shareholders were entitled to profits in respect of the sum actually paid on these shares. The directors of the company, as newly constituted, were elected according to the provisions of the act; a call of 1*l.* 5*s.* per share payable in October 1847, was made in respect of the shares of 31*l.*, and a call of 3*l.* payable in December 1847 was made in respect of the shares of 22*l.* each. In May 1848 the directors made a further call of 2*l.* 5*s.* per share payable in June 1848, on the shares of 31*l.* each. The bill alleges that James Bancroft and the directors formed a scheme to conduct the affairs of the company without regard to the general benefit of the shareholders, and in such manner as to benefit the holders of the shares of 27*l.* 10*s.* each and 22*l.* each, to the prejudice and injury of the holders of the shares of 31*l.* each, and that they took measures to obtain a majority in the board of directors, to depreciate the market value of the shares of 31*l.* each,

(7) 2 You. & C. C.C. 48; s. c. 12 Law J. Rep. (n.s.) Chanc. 65.

(8) 1 Hall & Twells, 320; s. c. 1 Mac. & Gor. 225; 1 De Gex & Sm. 750; 18 Law J. Rep. (n.s.) Chanc. 265.

(9) 11 Sim. 327; s. c. nom. *Preston v. Guyon*, 10 Law J. Rep. (n.s.) Chanc. 73.

(10) 5 Rail. Ca. 211; s. c. 16 Law J. Rep. (n.s.) Chanc. 449.

(11) 1 Phill. 779; s. c. 16 Law J. Rep. (n.s.) Chanc. 100, 302.

(12) 1 Coll. 237.

(13) 2 Coll. 629.

and to cause an alarm among the holders of such shares, with a view to induce those holders to consent to certain disadvantageous terms which they intended to propose for the relinquishment or modification of the interest of such shareholders, for the benefit of the holders of shares of 27*l.* 10*s.* and 22*l.* each. An attempt to effectuate such a scheme was alleged to have been made at a general meeting in 1848, and afterwards by causing a bill to be introduced into parliament, and that an opposition being made by holders of shares of 31*l.* each, a meeting of the directors was held on the 10th of February 1849, and that a resolution was then passed to make a call of 10*l.* per share in respect of the shares of 31*l.* each, one-half to be paid on the 16th of March and the other half on the 16th of April then next. The bill alleges that the call of 10*l.* was not required for the execution of the works of the company intended to be executed, but was made only to intimidate the holders of shares of 31*l.* each; and it is further alleged that in consequence of certain works being abandoned the amount of the call actually required was not so great as the call which has been made, but that the call having been made, certain of the holders of shares of 31*l.* each, who had not paid up the money due on them, had made the payments required of them, but others have refused to do so, alleging the payments not to be required for the purposes of the act. The bill set forth statements from which it seems intended to be inferred that the call is unnecessary, and that the estimates of liability suggested as an excuse for the call have been exaggerated, and that the real motive of the directors in making the call had been to injure the holders of the shares of 31*l.* each, by compelling them to consent to a relinquishment or modification of the interest which they have in their shares. It is charged that the respective holders of shares of 27*l.* 10*s.* each and 22*l.* each, artfully contrived to get a majority of votes over the holders of shares of 31*l.* each, and that in consequence of the existence of such majority most of the holders of shares of 31*l.* each have considered it useless to attend, and have not attended any meetings of the company since August 1848, and that the proceedings at all subsequent meetings of

the company have been wholly controuled by the holders of shares of 27*l.* 10*s.* and 22*l.* each. The bill plainly proceeds on the notion that it is within the jurisdiction of this Court to take the accounts and to make the inquiries necessary for the purpose of ascertaining whether, under the circumstances which it is alleged the company is reduced to, and it being a continuing concern, it is proper with a view to the management of the affairs of the company to raise money by way of calls from shareholders whom the plaintiff assumes to represent, and who have never paid up the call, nor taken the trouble to attend the meetings in which the question, whether any such call was to be made was discussed and determined. It appears to me that the case can only be considered as an attempt to induce this Court to interfere in the internal management of the affairs of the company, and to take on itself to determine the question, what calls shall be made, and to determine matters which ought to be determined by the shareholders themselves at general meetings. The only foundation for relief in this court is, the allegation that the calls, in the circumstances that have happened, are not wanted; that the plaintiff, and other shareholders of a class to which he belongs are, or are likely to be defrauded by a scheme formed by the other shareholders seeking in some way to benefit themselves and other classes of shareholders to the prejudice of the plaintiff and those for whom he sues, and are proceeding to enforce calls on them in pursuance of such alleged fraudulent scheme. The bill contains many allegations of improper and fraudulent motives, an intention to prejudice one class of shareholders for the benefit of the others; but these allegations do not rest on any specific fact sufficient to support the imputations, and the plaintiff, so far from stating that any attempts have been made to bring the matters under the consideration of the shareholders at all, and to procure any resolution of the directors in the management of the affairs of the company to be rescinded, states the contrary, and that most of the shareholders whom he sues for have not attended the meetings, or made any attempt to correct errors that have been made. It does not

appear from facts distinctly alleged in this bill, that the holders of shares of 31*l.* each have made payments in proportion to the holders of the other shares, or that they are not now more in arrear than other shareholders, or that it might not be right and just to enforce payment of the calls complained of, either for the purpose of carrying on works which it may be necessary to complete, or for the purpose of paying debts or answering liabilities which must be provided for; and the plaintiff not thinking fit to call or attend a meeting, at which any question of this sort might properly be settled, prefers coming to this Court for an inquiry to ascertain whether any part, and how much, of the call of 10*l.* is required for the purpose for which the money so required is lawfully applicable, and for an injunction to restrain any proceedings to recover the amount of such call. It is, indeed, alleged, that there is an intention to abandon part of the works, for the completion of which the powers were granted to the company. This may be quite unlawful, probably is so, but that is not sufficient to shew that the enforcement of the call may not be necessary for lawful purposes. And even supposing the plaintiff to have some well founded reason for complaining of what has been done, it appears to me he cannot have the remedy he asks. This bill contemplates the continuance of the company for, at least, some of the purposes for which it was incorporated, and the maintenance of some of the works it was authorized to make; and it would be impossible for this Court to entertain jurisdiction in such a case as this, without assuming authority to interfere in the internal management of all companies and partnerships whenever a question arose as to the proper amount of the call required for the lawful purposes of the act. I am, therefore, of opinion that the plaintiff is not entitled to any relief on this bill, and that the demurrer for want of equity must be allowed.

I think the bill is defective also for want of parties in suing on behalf of the shareholders of 31*l.* each, as well those who have paid the calls as those who have not, and also defective in not alleging as it ought to do, under the circumstances, that the holders of the other shares are duly

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and fully represented by the defendants. The demurrer must, therefore, be allowed.

Mr. Roundell Palmer asked for leave to amend the bill.

The MASTER OF THE ROLLS.—If the plaintiff has any ground of complaint, he can file a new bill. The allowance of this demurrer will not prevent it if there is any equity to proceed upon.

K. BRUCE, V.C.
April 26.

In re THE VALE OF NEATH
AND SOUTH WALES
BREWERY JOINT STOCK
COMPANY, *ex parte*
KLUHT.

Company—Winding-up Act—Feme Covert—Husband and Wife.

A, a feme sole, being entitled to shares in a company, married B. Nothing was done with the shares, which continued to be in the name of A. A. died:—Held, that B. was not liable as a contributory, under the Joint-Stock Companies Winding-up Act, 1848, in respect of losses or liabilities as to the shares before or after the coverture.

Miss Keene, being entitled to five shares in the above-mentioned company, in the month of November 1842 married Mr. Kluht. The shares, however, still continued in her name, and nothing was done with them. Mrs. Kluht died on the 15th of March 1845.

The Master having put Mr. Kluht's name on the list of contributories, without qualification, this was a motion that his decision should be reversed or varied.

Mr. Bacon and Mr. Rogers, for the motion, cited—

Heard v. Stamford, 3 P. Wms. 409, and *Roll. Abr. tit. 'Baron and Feme,'* 351.

Mr. Russell and Mr. Terrell, for the official manager.

Knight Bruce, V.C. said that Mr. Kluht ought not to be on the list as a con-

tributory in respect of losses and liabilities before or after the coverture. With this declaration, he referred it to the Master to review his decision.

K. BRUCE, V.C. { *In re* THE DIRECT EXETER, PLYMOUTH AND DEVONPORT RAILWAY COMPANY, *ex parte* HALL.
May 2.

Company—Winding-up Act—Contributory—Contribution of Expenses.

A. went to a meeting held for the purpose of getting up a railway, but left before the business commenced, and refused to have anything to do with it. Some time after, A, under the threats of the secretary of the company, and a protest of non-liability, paid certain sums towards the expenses of the company. These circumstances were stated in the affidavit of A:—Held, that A. was not a contributory within the meaning of the Joint-Stock Companies Winding-up Act.

Dr. William Hall having been put on the list of contributories of the above-named company, this was a motion, on his behalf, that his name should be taken off.

The grounds of his claim for exemption were stated in his affidavit, which, so far as relates to his original connexion with the company, was as follows:—

“On the 6th of October 1845 I was walking in the High Street, Exeter, about two o'clock in the afternoon, when I was met and invited by Mr. Floud, of Exeter, the solicitor to the company, to attend a meeting about to be held within a few minutes at the residence and office of Mr. Floud, in order to concert measures for the formation of the company. I was assured by Mr. Floud, that I should incur no liability by attending such meeting. In consequence of such invitation and assurance I was induced to attend such meeting, but I left before any business was transacted. Before I left the house I went into the clerk's office, and told a young man there who, apparently, was acting as clerk, not to put my name down in the books of the company, and that I would have nothing to do with the railway scheme. I called on several consecutive days at Mr. Floud's office, for

the purpose of ascertaining, from Mr. Floud or the secretary to the company, personally, whether my request of not being inserted on the books of the company had been complied with, but I could not obtain an interview with either of them; but on Sunday, the 12th of October, I saw Mr. Farrant, who promised to erase my name from the books of the company. I have been informed and believe that my name did not appear in any published prospectus or other printed papers of the company. On the 2nd of November I received a letter from Mr. Farrant, stating that my name had been erased from the prospectus agreeably to my request made some time before. I heard no more of the company until the 1st of January 1846, when I received a printed circular from Mr. Farrant calling upon me to pay to the credit of the company 15*l*.”

The affidavit then went on to state that Dr. Hall had paid that sum on being threatened by Mr. Farrant that he should be given up to the creditors, and that he paid it under protest of non-liability, and that in April 1846 Mr. Floud made a further demand, and made the same threats as Mr. Farrant had on the former occasion, and that he paid 50*l*. more on receiving a guarantee from Mr. Floud, on behalf of the managing committee, that he should not be subjected to any further annoyance. Dr. Hall also stated that he never had held a share in the company, and that he never attended any meeting except the one before mentioned, and that he had never applied for or accepted shares.

Mr. Terrell, for the motion.

Mr. Russell and *Mr. Roxburgh*, for the official manager.

KNIGHT BRUCE, V.C.—The only definition of the word “contributory” is contained in the 3rd section of the Winding-up Act, 1848 (1), where it is said that “the word ‘contributory’ shall include every member of a company, and also every other person liable to contribute to the payment of any of the debts, liabilities, or losses thereof.” It has not been suggested that the Court is not to look at or consider Dr. Hall's affidavit, although the affidavit

of a person directly interested. Having considered this affidavit, I feel myself bound to state my belief of the correctness of the statements made in it. Believing, then, that affidavit, I am unable to consider Dr. Hall a member of the company, or liable to contribute to the payment of any of the debts, liabilities, or losses thereof. With great deference, therefore, to the opinion of the Master, I would rather not retain Dr. Hall's name on the list.

K. BRUCE, V.C. *In re THE ROYAL BANK
OF AUSTRALIA, ex parte
LATTA.*
March 26.

*Company—Winding-up Act—Grounds
for Petition for winding up a Company—
Actions against Shareholders.*

An action brought against a shareholder of a company in the Court of Session in Scotland is not an action brought in any of Her Majesty's courts of record, within the meaning of the 5th paragraph of the 5th section of the Joint-Stock Companies Winding-up Act.

A banking company issued debentures. An action was brought on one of those debentures against A. a shareholder, residing in Scotland, in the Court of Session there. The company declined to indemnify him against such action:—Held, that this came within the 8th paragraph of the 5th section of the act, and that A. had a right to petition for the winding up of the company.

A company called "The Royal Bank of Australia" was formed in 1840. Soon after its establishment, the directors issued debentures, which were made payable at long periods. Some of these debentures fell due in 1848, and the company not being able to meet them, actions were commenced in 1849 by the holders of some of them against Mr. Latta, one of the shareholders, resident in Scotland, in the Court of Session there, in which actions claims were made against him for upwards of 100,000*l.* Mr. Latta had applied to the company to be indemnified in respect of these actions, but had not obtained any satisfactory reply. The actions were still pending.

This was a petition presented by Mr. Latta (1) for winding up the company.

Three grounds of objection were made to the petition:—First, none of the cases mentioned in the Winding-up Act as requisite for the foundation of a petition had occurred. Secondly, although actions had been brought against Mr. Latta, yet it was very highly probable that they would not succeed, as it might be very strongly contended that the debentures were invalid. There was then, in fact, no danger from which it was required to protect Mr. Latta. Thirdly, the shareholders at large were anxious that the actions should go on, and that the company should not be wound up, while both the directors who had issued the debentures and the holders of the debentures were anxious that the company should be wound up. The petition was, in fact, that of the directors and holders of debentures, and not of the shareholders, and was presented by Mr. Latta in collusion with the directors and debenture holders.

By the 5th section of the Winding-up Act, 1848, it is enacted that any person, being a contributory to a company, may petition in any of certain cases therein mentioned. The 5th paragraph of this section is as follows:—"If any action shall have been brought in any of Her Majesty's courts of record against any contributory of a company for any debt or demand which shall be due or claimed to be due from or by such company, and such company shall not" give an indemnity as there mentioned. The 7th is as follows:—"If any company shall have been dissolved, or shall have ceased to carry on business, or shall be carrying on business only for the purpose of winding up its affairs, and the same shall not be completely wound up." The 8th paragraph is as follows:—"Or if any other matter or thing shall be shewn which, in the opinion of the Court, shall render it just and equitable that the company should be dissolved."

Mr. James Parker and Mr. Cairns, for the petition.

Mr. Bacon and Mr. Anderson, for some of the shareholders, contended, first, that the circumstances stated by Mr. Latta in

(1) See *ante*, p. 163.

his petition did not come under any of the eight paragraphs of the 5th section of the Winding-up Act, 1848; and secondly, that the debentures were invalid, and that no protection was required in respect of them; and urged, thirdly, that, on the evidence, it was not a shareholders' or a contributories' petition, or for the good of the company, but for that of the directors.

Mr. Russell and *Mr. Webster*, for some of the directors.

[In the course of the argument *HIS HONOUR* said, he thought that the case did not come within the 5th paragraph of the 5th section of the act.]

KNIGHT BRUCE, V.C.—This case may or may not be within the 7th paragraph of the 5th section of the act. Upon that I give no opinion. But, adopting the construction of the 8th paragraph, which was adopted by the Lord Chancellor in *Spackman's case* (2), namely, that it must be considered as referring to cases *ejusdem generis* with some or one of those mentioned before, I am of opinion that this case falls within the 8th paragraph, and that it is a case in which the petitioner is entitled, on his own behalf, to the interposition of the Court, if he comes here fairly, unless he shall be indemnified from the consequences of the proceedings in the Court in Scotland. Now, it is or it may be true, that the debenture holders or some of them are favourable to this petition, and that *Mr. Latta* may have in view their benefit, as well as his own, in presenting this petition. The evidence does not justify the conclusion that the petition is either fraudulent or collusive; nor does it justify the conclusion that, with a view to himself and for his own benefit, *Mr. Latta* has not a standing place here. It is, under the circumstances, impossible to shut the door of this court against him, and, unless he shall be indemnified, and effectually indemnified, against the Scotch proceedings, I think that he is entitled to the order he asks for, that is, the dissolution and winding up of the company.

(2) *Ex parte Spackman*, 1 Hall & Twells, 229 : s. c. 1 Mac. & Gor. 170; 18 Law J. Rep. (N.S.) Chanc. 261.

K. BRUCE, V.C. } *In re THE UNION BANK*
July 16. } *OF CALCUTTA.*

Company—Winding-up Act—Discretion of the Court as to winding up Companies—Banking Company in India.

The Court has a discretion to refuse to order a company to be wound up under the Joint-Stock Companies Winding-up Acts, where there is reason to believe that more harm than good would be done by the order, and that such order would not be necessary or expedient.

A petition for winding up a banking company established at Calcutta, with correspondents in London, which had suspended payments and where a deed of arrangement had been executed in India, on the ground of an alleged improper carrying out of such deed in England, was dismissed.

This was a petition presented under the Joint-Stock Companies Winding-up Act, for the dissolution and winding up of the Union Bank of Calcutta, by one of the shareholders resident in England. The petition stated that the company was established in 1839 at Calcutta by persons resident there. The petition contained, among other things, statements to the effect that the business of the company was carried on in India, but that some of it was transacted in England, and particularly by means of the banking-house of *Messrs. Glyn & Co.* in London; that the business of the company had been suspended, and that a deed of arrangement between the company and their creditors had been executed at Calcutta, and that an endeavour had been made in this country to enforce an assessment made on the shareholders resident here to pay the debts, but that such assessment was unjust, and that proceedings had been commenced against the petitioner for his contribution.

Mr. Russell, *Mr. Malins* and *Mr. Smale*, for the petition, referred to the case of the Royal Bank of Australia (1).

Mr. Lloyd, *Mr. W. M. James*, and *Mr. C. M. Roupell*, against the petition, were not called upon.

(1) *Ante*, p. 387.

KNIGHT BRUCE, V.C.—I assume that suits may be maintained in this country upon the subject of the transactions of this company, whether suits between members of the partnership or suits of a different description. I assume that, according to a proper interpretation of the acts in question this Court has jurisdiction to proceed for the purpose of dissolving or winding it up, so far as it can be done in the absence from its jurisdiction of some of its members. These things I assume, without deciding in favour of the petitioner; but it is not in every case under these acts that the Court is bound to make the order for winding up. It is incumbent on the Court not to act under this statutory jurisdiction in a case where there shall appear judicial grounds for holding it to be not necessary or not expedient to do so. Now this is the case of a company established in India, the members of which have a domicile there, but who have no connexion with this country, except that all or some of the members are subjects of Her Majesty, and except that it had correspondents here, as possibly or probably it had correspondents in other parts of the world, without which correspondents probably the business of banking upon any extensive scale could not be carried on or transacted. It, however, does not render it, in my opinion, a substantial reason for proceeding under this act of parliament, unless it shall be shewn that there exists in the country the means of doing substantial justice, or of doing more good than harm by interfering with such a jurisdiction as that created by these statutes. In my opinion, the presumption is against the necessity for interfering in such a case. It is incumbent on those who desire the interference of the Court to shew that the real view of the case is not the *primâ facie* view of it. Everything I have heard rather strengthens the presumption that much more mischief and inconvenience would be done by acting in this case, with the inefficient means and partial results with which the Court must act, than by declining to interfere and leaving those concerned to such remedies as by the law of this country or of India, or both, would be open to them if these statutory provisions had not existed. Assuming, there-

fore, in the petitioner's favour the existence of the jurisdiction, the case seems to me to be one in which the Court ought not to interfere.

Petition dismissed, without costs, and without prejudice to any suit the parties might think fit to institute.

K. BRUCE, V.C. { *In re* THE BOROUGH OF
March 25. { ST. MARYLEBONE JOINT-
STOCK BANKING COM-
PANY, *ex parte* STAN-
HOPE.

Company—Winding-up Act—Contributory—Powers of Directors.

A banking company was established in 1836. By one of the clauses of the deed of settlement the directors were empowered to act in such manner as would, in their opinion, best promote the welfare of the company, and, for that purpose, to make rules, bye-laws, and provisional regulations. A. was an original director of the company, and held fifty shares in it. In 1838 an arrangement was entered into between A. and the other directors, under which A. was to retire from the direction and give up his shares to the company at par. The company broke up in 1841, and was ordered to be wound up:—Held, that the transaction of 1838 was not within the powers of the directors, and that A. was a contributory in respect of the shares held by him.

The Borough of St. Marylebone Joint-Stock Banking Company was established in 1836. Colonel Stanhope was one of the original directors of the company, and had fifty shares in it. In 1838 Colonel Stanhope, being dissatisfied with the position of the company, wished to retire from it, both as shareholder and director. The terms of his retirement were discussed at a board of directors, and the result appeared in the following entry in the minute-book.—“Terms of Colonel Stanhope's retirement from the direction. Colonel Stanhope's shares to be taken at par, with dividend to day of transfer, if realized. Release and indemnity may be arranged by the solicitors of the parties, and his

proportion of attendance fees to be paid up to the period of his retirement, when the same shall have been voted. (Signed) Francis C. Knowles, Chairman."—The following entry was made in Colonel Stanhope's account in the Stock account:

"Dr.—1838, May 19. Stock for amount cancelled.—50 shares. 550*l*."

The vacancy in the direction was filled up, but it did not appear that any of the fifty shares originally belonging to Colonel Stanhope were ever re-issued. The Company broke up in 1841, and was directed to be wound up under the Joint-Stock Companies Winding-up Act. The Master charged with the matter—subsequent to the decision in *Morgan's case* (1)—put Colonel Stanhope's name on the list of contributors without qualification.

This was a motion, by way of appeal from the Master, that Colonel Stanhope's name should be excluded from the list, or that his liability might be limited to the losses incurred previously to May 1838. It was admitted that Colonel Stanhope's retirement was *bond fide*, and that it was considered that by his retirement he was acting for the benefit of the company.

The deed of settlement of the company was dated the 31st August 1836. The clauses in this deed, upon which the question discussed on this motion turned, were as follows:—

Clause 90.—"That in all cases not provided for by this or some supplementary deed of settlement of the said company it shall be lawful for the said general directors to act in such manner as may appear to them best calculated to promote the interest and welfare of the said company; and, for the better guidance of the said general directors in their management and superintendence over the property, affairs, and concerns of the said company, it shall be lawful for them to make from time to time whatever rules, bye-laws, or provisional regulations they may think expedient, so as the same be not inconsistent with, or repugnant to, any of the express provisions contained in these presents, or to be contained in any supplementary deed thereto, or to the fundamental principles or

constitution of the said company, as expressly established and declared thereby; and, at any time or times, to alter or repeal any of the said rules, bye-laws, or provisional regulations so to be made, and which shall not have been established by, or incorporated into any supplementary deed of settlement of the said company; but so nevertheless that two-thirds of the general directors at least shall concur in every such repeal, alteration, or variation."

Clause 91.—"That it shall be lawful for the general directors of the said company for the time being, but with the consent of some general meeting of the proprietors, to make any new orders, rules, laws, regulations, or provisions for the better management of the said company and the business thereof, and to amend, alter, repeal, or make void all or any of the clauses and articles contained in these presents or to be contained in any future deed or deeds relating to or regulating the affairs of the said company; provided no order, rule, law, regulation, provision, matter, or thing shall be made, done, or entered into, releasing, or tending to release, any proprietor from his or her liability to the said company, or affecting the interests of the proprietors in the profits thereof, or repealing or altering the provisions in these presents contained for the dissolution of the said copartnership; and provided also that no resolution of any general meeting of proprietors consenting to the alteration or repeal of any clause or article contained in these presents or any supplementary deed thereto shall be valid or effectual, unless notice in writing of an intention by the general directors to propose such alterations or repeal shall be sent to the proprietors of the said company (in the way hereinafter provided for in the case of notices to proprietors) at least one calendar month previous to the meeting at which such alteration or repeal is intended to be proposed, and unless also a resolution approving of every such alteration or repeal be not only passed at such general meeting, but be confirmed at a subsequent extraordinary general meeting of proprietors to be called expressly for that purpose, and of which extraordinary general meeting notice in writing, expressing the object and purpose of such extra-

(1) 1 Hall & Twells, 320; s. c. 1 Mac. & Gor. 225; 18 Law J. Rep. (N.S.) Chanc. 265.

ordinary meeting, shall be sent to the proprietors at least ten days previous to the day to be appointed for holding such extraordinary general meeting."

Mr. Malins and Mr. Southgate, for Colonel Stanhope, cited *Taylor v. Hughes* (2).

Mr. Lloyd and Mr. Hetherington, for the official manager.

KNIGHT BRUCE, V.C.—This seems to me to be a hard case, if the transaction was, as it is admitted to have been, fairly intended. Assuming, however, that it was fairly intended, it is, I think, impossible to disturb the conclusion at which the Master has arrived, as in my opinion that conclusion is accurate. In my opinion the transaction was beyond the powers conferred on the directors by the 90th section of the deed. It is needless, therefore, to say whether the case is influenced by the 91st section. I cannot disturb the decision of the Master.

K. BRUCE, V.C. { *In re* THE BOROUGH OF
JULY 22. { ST. MARYLEBONE JOINT-
STOCK BANKING COM-
PANY, *ex parte* BUSK.

Company—Winding-up Act—Contributory—Powers of Directors.

A banking company was projected in June 1836, and A. was one of the promoters and directors. The bank commenced business on the 9th of September. On the 24th of September it was agreed between A. and the other directors that A. should retire from the company. On the 18th of October the first signature was affixed to the deed of settlement, which however was dated in August. By that deed it was declared that all the acts done by the directors previously to the execution of the deed should be ratified. On the 25th of October A.'s retirement from the company was advertised in the Gazette. In 1841 the company broke up, and was afterwards ordered to be wound up:—Held, that A. was not a contributory.

(2) 2 J. & Lat. 24.

The above-mentioned banking company was projected in June 1836, Mr. Busk being one of the promoters and directors. In July, Mr. Busk paid 50*l.* as a deposit on fifty shares which he had taken in the company. On the 9th of September the bank commenced business. Mr. Busk, being dissatisfied with the way in which the business was carried on, desired to retire from the company, and on the 24th of September it was agreed between him and the other directors that his deposit should be returned, and that he should absolutely cease to be a member of the company.

On the 18th of October the first signature was affixed to the deed of settlement. The date of that deed was the 31st of August, but it had not been prepared at that time, and its provisions were under consideration during the whole month of September. The 156th clause of that deed was as follows:—"And it is hereby agreed that, notwithstanding the signing of the settlement deed by parties at different dates and different times, the liabilities of all the parties shall be held to have commenced from the 5th of September, and the said persons of the first part do hereby ratify and confirm all acts, contracts, deeds, matters, and things up to the time of the execution of these presents done, executed, and performed by the provisional committee, or the directors, or by the order and direction of them, or any of them, in relation to their concerns and affairs."

This deed was not executed by Mr. Busk.

On the 25th of October the following advertisement was inserted in the *Gazette*: "Notice is hereby given that the partnership now or lately subsisting between Hans Busk, of &c., and the shareholders or proprietors of the Borough of St. Marylebone Joint-Stock Banking Company in Cavendish Square has been dissolved." This advertisement was expressly sanctioned by the directors.

In January 1837 Mr. Busk's deposit was paid back to him, and a memorandum to that effect and that his fifty shares were cancelled, was inserted in the stock ledger.

In August 1841 the company broke up. The company was ordered to be wound

up under the Joint-Stock Companies Winding-up Act, and the Master charged with the matter put Mr. Busk's name on the list of contributories in respect of fifty shares.

This was a motion, by way of appeal, that Mr. Busk's name should be taken off the list of contributories.

Mr. Malins and *Mr. Eade*, for the motion.

Mr. Stuart and *Mr. Hetherington*, for the official manager, referred to *Stanhope's case* (1).

KNIGHT BRUCE, V.C.—The question whether Mr. Busk is liable or not liable to any unsatisfied creditor of the company, which is the subject of the order now appealed from, is not before me. He may or may not be so liable. I consider that point immaterial. The question is, whether he is liable as a contributory, as between himself and the company or its members, in that capacity. Now, it is material to observe in the present case that the deed establishing or regulating the affairs of the company, bearing date the 31st of August 1836, was, as it is admitted, not executed by any person whatever before the 18th of October in that year. Until that deed had been executed by some person, the relation between Mr. Busk and the directors and the other shareholders of the company or intended company must be considered as regulated by the general law of the country, as it then stood, applicable to such contracts. I think that places Mr. Busk in a situation in which it was his right to withdraw at any time from the partnership, so far as he alone was concerned, but not so as to exempt himself from any former liability. Dissatisfaction having arisen between Mr. Busk and the other directors of the company or intended company, he first ceases to be a member of the direction, and then, by agreement between him and the directors acting in the general management of the affairs of the association, he retires from it altogether on the 24th of September. It is agreed, in effect, on that day that he should cease to be a member. In pursuance of that agreement (although after

the deed was executed by some of the parties), advertisements were inserted in the *Gazette*, the earliest of which appeared on the 25th of October; on which day it was sanctioned by the directors in these terms:—"Mr. Busk's notice in the *Gazette* approved and signed by him." The advertisement was this:—"Notice is hereby given that the partnership now or lately subsisting between Hans Busk, of &c. and the shareholders or proprietors of the Borough of St. Marylebone Joint-Stock Banking Company in Cavendish Square has been dissolved. Dated this 25th of October 1836." In two or three months afterwards, in pursuance of the agreement, the 50*l.* deposit was returned.

The first question is, what is the true meaning of this? whether the meaning is that, as between themselves, he was to continue liable for previous engagements, or whether he was considered as separate from the company as from the beginning? My opinion is, that the true meaning of the parties to that contract was, as between themselves, whatever it might be as to creditors, that he should be treated on the footing of having never been a member of the company. That having taken place on the 24th of September (although not recognized in the books until the 25th of October), I find the 156th clause of the deed of settlement (which was not executed before the 18th of October) worded thus: "And it is hereby agreed that notwithstanding the signing of the settlement deed by parties at different dates and different times, the liabilities of all the parties shall be held to have commenced from the 5th of September, and the said persons of the first part do hereby ratify and confirm all acts, contracts, deeds, matters, and things up to the time" (not of the date of the 5th of September, but) "of the execution of these presents done, executed and performed by the provisional committee, or the directors, or by the order and direction of them or any of them in relation to their concerns and affairs." I am of opinion that this ratified the agreement of the 24th of September, if it wanted ratification, and that those who are parties to the deed (being in effect persons represented by the official manager) cannot be heard to say that Mr. Busk continued a member of the company,

(1) *Ante*, p. 389.

or that he was not discharged from his liability.

I will add but one observation. I do not see any necessity for saying, in this particular instance at least, that the two acts of parliament before me have introduced *ex post facto* law to change or increase the liability of Mr. Busk. Supposing, then, that these acts had not passed, that the agreement of the 24th of September was made, that the advertisements were published in the *Gazette*, and that no claim was afterwards made on Mr. Busk; and supposing that, instead of the order now before the Court a bill had been filed against Mr. Busk by some on behalf of all the members of the company for contribution to outstanding debts, I am of opinion that, considering the notice, and the lapse of time, and the other circumstances, such a bill must inevitably have been dismissed.

I am, on the whole, of opinion that Mr. Busk's name ought not to be placed on the list.

K. BRUCE, V.C. { *In re* THE IMPERIAL
August 1. { SALT AND ALKALI
COMPANY.

Company — Practice — Winding-up Act — Reference to the Master — Petition — Report.

Under the Joint-Stock Companies Winding-up Act a report of the Master, upon a reference to inquire whether a company ought to be wound up, ought to be confirmed on an application to the Court by way of petition, and not by motion.

A reference had been made to the Master, on a petition presented in this matter, whether it would be fit and proper that the above-mentioned company should be wound up, and the Master made his report, whereby he found that it was fit and proper that it should be wound up.

This was an application, *by motion*, that the Master's report should be confirmed, and for consequential directions. An objection was made to the motion on the ground that the application ought to have been made *by petition*.

NEW SERIES, XIX.—CHANC.

The 12th section of the Joint-Stock Companies Winding-up Act declares "that, on the hearing of any such petition (for winding up) it shall be lawful for the Court to refer it to the Master to make preliminary inquiries as to the expediency of winding up the company, &c.; and that, if it shall appear, from the Master's report, that such winding up is expedient, to make such order absolute as hereafter mentioned." The 14th section declares "that it shall be lawful for the Court, on the hearing of any petition for dissolution and winding up, or for winding up, either originally or subsequently, or on further directions, to dismiss such petition, with or without costs, or to make an order absolute for the dissolution and winding up or for the winding up of the company, under the provisions of the act."

Mr. Bacon for the motion.

Mr. Malins and *Mr. Renshaw* contended that the confirmation of the Master's report ought to be made on petition, and referred to the 12th and 14th sections of the act.

Mr. Bacon, in reply, referred to the 100th section, where the Master is authorized to make a special report, which should be brought before the Court by motion.

KNIGHT BRUCE, V.C. said, that he thought (if he must decide such a point) that the former petition was exhausted, and that a fresh petition was necessary. The order he should make would be this:—let the motion stand over, with liberty to file a petition.

K. BRUCE, V.C. { *In re* THE NORTH OF
July 17. { ENGLAND JOINT-STOCK
BANKING COMPANY, *ex*
parte GOUTHWAITE.

Company — Winding-up Act — Contribution — Receipt of Dividends — Executor.

A, a shareholder in a company, died leaving B. his executor. B. did not comply with the formalities laid down by the deed of settlement as to executors becoming members of the company in respect of the shares of their testators, but received the dividends declared on the shares after the death of the testator:

3 E

—*Held, that B, either in his own or his representative character, must be held to have made a contract with the directors, and ought to be put in the list of contributories.*

Mr. Gouthwaite, who held eighty shares in the North of England Joint-Stock Banking Company, died in 1842, having by his will appointed Mrs. Gouthwaite his executrix, who duly proved the will.

The 31st clause of the deed of settlement of the company declared that the executors of a shareholder should not be entitled to his shares until certain formalities should have been complied with. This clause is set out in 18 *Law J. Rep.* (N.S.) Chanc. 250.

Mrs. Gouthwaite did not comply with these formalities, but received the dividends declared by the company from the testator's death until 1846.

The Master charged with the winding up of the company declined to insert Mrs. Gouthwaite's name in the list of contributories. This was an application that such name should be inserted.

Mr. Bethell, Mr. Bacon, and Mr. J. V. Prior, for the motion.

Mr. Russell and Mr. Stevens, for Mrs. Gouthwaite.

KNIGHT BRUCE, V.C.—If by the company's deed this lady ought to be on the list of contributories there is nothing to discuss; but upon this I give no opinion, because, assuming that, on these provisions alone, she ought not, the question arises whether circumstances have not occurred which afford sufficient evidence of a contract between her and the directors, that she, either personally or in her representative character, should be answerable to the company in respect of these shares. She continued to receive, after the death of her husband, the profits on these shares as his representative, and I am of opinion that it would be unreasonable to attribute to the directors and to her an intention that she should participate in the profits without being liable to participate in the losses. It may be said that it was not competent to her to contract as an executrix, and there may be much in that; but, if she entered into a contract, as executrix, which could not be maintained, it is to be feared that she rendered herself liable as an agent act-

ing without authority. It may be said that the directors were not competent to enter into such a contract, but my opinion is that it was competent to them to do so. Upon the question whether the contract was by her in her own right or as the personal representative of her husband, my opinion is, that in this stage of the case no declaration ought to be made. I shall declare that Mrs. Gouthwaite was a contributory or member, either in her own right or as representative of her husband, and, with that declaration, refer it back to the Master to review his decision.

K. BRUCE, V.C. August 5.	{	In re THE DIRECT
		BIRMINGHAM, OXFORD, READING AND BRIGHTON RAILWAY COMPANY, <i>ex parte</i> CAPPER.

Company—Winding-up Act—Contributory—Letter of Allotment—Condition.

A. applied for shares in a railway company. A month after the application he received a letter of allotment, in which were contained the words "not transferable," and a declaration that, if the deposit was not paid within a month, the allotment should be null and void. A. never paid the deposit:—Held that, by reason of this declaration in the letter of allotment, A. was not a contributory.

Whether the words "not transferable" would have had that effect—quære.

Mr. Capper in September 1845 applied to the provisional committee of the above-mentioned company for shares, by filling up the blanks in the form of the letter of application issued by the company, and sending it to them. The letter was as follows:—

"Gentlemen,—I request that you will allot me fifty shares of 25*l.* each, in the Direct Birmingham, Oxford, Reading and Brighton Railway, and I do hereby undertake to accept the same, or any less number you may allot me; to pay the deposit of 2*l.* 12*s.* 6*d.* per share thereon, and to sign the parliamentary contract and subscribers' agreement when required."

A month after this letter was sent, the following document was sent in reply to Mr. Capper's application :—

"Letter of allotment. Not transferable. Direct Birmingham, &c. Railway Company. Capital, 800,000*l.*, in shares of 25*l.* each. Deposit, 2*l.* 12*s.* 6*d.* No. of letter, 51. No. of shares, 30.

"Sir,—The committee of management have allotted to you thirty shares in this undertaking, and I am directed to request you will pay the deposit of 2*l.* 12*s.* 6*d.* per share, amounting to £ , into one of the under-mentioned banks on or before Friday the 24th day of October 1845, or this allotment will be null and void;" and (after a list of banks) the letter then proceeded as follows :—

"This letter, with the bankers' receipt appended hereto, will be exchanged for scrip upon your presenting it at the offices of the company and executing the parliamentary contract and subscribers' agreement, which will lie at the above offices on or about the 27th of October, and due notice will be given when the deeds will be sent into the country."

Mr. Capper's name having been put on the list of contributories by the Master charged with the winding up of the company, this was an application that it might be taken off.

Mr. Malins and Mr. W. T. S. Daniel, for the motion.

Mr. Bethell and Mr. Roxburgh, for the official manager, were not called upon.

Knight Bruce, V.C.—Upon the words in the letter of allotment "not transferable" I would rather not give an opinion. My belief is, that this case may be decided upon other grounds. On the 19th of September Mr. Capper makes a proposal to take a number of shares, not exceeding fifty, to be allotted to him, undertaking to pay the deposit. No time is mentioned for either, and there is no stipulation or proposal in the offer that failure to comply with either shall render the whole of no effect. The answer is not a simple one, for, independently of the expression "not transferable" (on which I decline to give any opinion) there is this provision—(the proposal being answered a month after it was made)—"If the deposit shall not be

paid within a week after the receipt of the letter, the allotment to be null and void." My opinion is, that this added a new term to the contract or proposal or intended contract, and therefore that it was within the power of the person who wrote the original letter, to whom the second letter was sent, to avail himself of the liberty given at the conclusion of the letter of acceptance to elect not to make the deposit, and therefore that the allotment should be null and void. I am of opinion that so to hold is quite consistent with the construction which, most reasonably, has been put upon provisions in leases that, where there has been a covenant that, if the rent shall not be paid or the covenants shall not be performed, the lease shall be void, it is not competent for a person to avail himself of his own default to avoid his contract. This does not, I think, range itself within these cases. This gentleman had power to avail himself of what was then proposed. He did not pay anything then or afterwards, and therefore I think that he is not a contributory. The costs must come out of the estate.

WIGRAM, V.C. }
1849. }
Nov. 12, 13. }

DAVIDSON v. PROCTOR.

Will—Construction—Power—Non-execution—Objects.

A testatrix, under a power, charged estates with a sum of money, and directed it to be paid to such of her mother's relations as her husband should by will appoint, and for want of such appointment then to her mother's relations according to the Statute of Distributions. The husband survived, but did not appoint the fund to any relation of his wife's mother :—Held, that the next-of-kin of the mother living at the death of the husband were entitled to the fund, in default of a valid appointment by the husband.

The testatrix mentioned in the pleadings, by her will, executed under a power reserved to her by her marriage settlement, charged certain freehold estates in which her husband had a life interest with the sum of 1,500*l.*, and directed the same to be

paid after her death to such of her mother's relations as he should by will appoint, and for want of appointment, then to her mother's relations according to the Statute of Distributions. The husband survived the testatrix, and by his will gave 1,495*l.*, part of the 1,500*l.*, to one W. N. Alcock, whom he erroneously stated to be one of the relations of his late wife's mother.

The bill was filed by the representative of the party who was the mother's sole next-of-kin at the death of the testatrix, against the trustees of the settlement and the parties who were the mother's surviving next-of-kin (originally seven in number) living at the death of the husband of the testatrix, and the representatives of such as had since died.

At the hearing on further directions the question was raised, whether the next-of-kin of the mother at the death of the testatrix, or those at the death of the husband, became entitled to the sum of 1,495*l.* in consequence of the non-appointment of it by the husband to a relation of the mother.

Mr. K. Parker and Mr. J. T. Humphry, for the plaintiff, contended, that the limitation in the will gave a vested interest to the next-of-kin of the mother living at the death of the testatrix, subject only to be divested by a valid appointment by her husband. They cited—

Vanderzee v. Aclom, 4 Ves. 771.

Walsh v. Wallinger, 2 Russ. & Myl. 80;
s. c. 9 Law J. Rep. Chanc. 7; s. c.
Tam. 425.

Bird v. Wood, 2 Sim. & S. 400; s. c.
4 Law J. Rep. Chanc. 86.

The Solicitor General, Mr. Wood, Mr. Amphlett, Mr. Greene, Mr. C. Barber, and Mr. Woodhouse, appeared for the next-of-kin of the mother living at the husband's death. In support of the argument, on behalf of those defendants, the following cases were cited—

Pope v. Whitcombe, 3 Mer. 689.

Supple v. Lowson, Ambl. 728.

Harding v. Glyn, 1 Atk. 469.

Beck v. Burn, 7 Beav. 495; s. c. 13
Law J. Rep. (N.S.) Chanc. 319.

Leeming v. Sherratt, 2 Hare, 14; s. c.
11 Law J. Rep. (N.S.) Chanc. 423.

Brown v. Higgs, 4 Ves. 708; s. c. 5
Ves. 495, and 8 Ves. 561.

Say v. Creed, 5 Hare, 580; s. c. 16

Law J. Rep. (N.S.) Chanc. 361.

Burrough v. Philcox, 5 Myl. & Cr. 73.

Lacey v. Philcox, Ibid.

Mr. Buxton appeared for the trustees.

Mr. K. Parker replied.

WIGRAM, V.C.—It is admitted that the husband, the donee of the power, might have appointed to relations of his wife's mother who were not her next-of-kin according to the statute, and that in default of such appointment, and in the absence of an express gift over, the Court would have implied a gift for the benefit of the class named as the objects of the power, although in distributing the fund it would have declined to exercise the right of selection given to the donee, and would have confined the distribution to the next-of-kin according to the Statute of Distributions. In the present case, however, there is an express gift in favour of the next-of-kin under the statute, in default of appointment by the donee. The Court cannot imply a gift where there is one in express words. The only question, therefore, is, whether the benefit was intended for the next-of-kin at the death of the wife, the donor, or for the next-of-kin at the death of the husband, the donee. Upon this question I am of opinion that the gift in default of appointment is contingent, and that there is no gift except in the direction to pay. The next-of-kin, according to the statute, living at the death of the husband, the donee, are, therefore, the parties to take the fund.

Decree accordingly.

WIGRAM, V.C. }
1849. }
Nov. 19, 20. }

MAINWARING v. BEEVOR.

Will—Construction—Bequest to all the Children of Testator's Sons—Distribution, Period of.

A testator bequeathed the residue of personal property to trustees upon trust to apply the dividends and income of it in the maintenance and education of the children of his two sons until they severally attained twenty-

*one years of age; and when each grandchild attained that age to raise and pay 2,000*l.* to each, and when all the grandchildren attained that age to pay the surplus of the said residuary estate to them as tenants in common, each grandchild upon the age of twenty-one years to take a vested interest:—*
Held, upon bill filed by all the children of one of the sons living at the death of the testator, when the youngest of them attained twenty-one (the other son being then a bachelor), that the plaintiffs were not entitled to a division of the trust funds in exclusion of any other children who might be born of either of the sons; but that the plaintiffs were entitled to the whole of the income, and would be entitled to the principal if no other such child should be born and attain the age of twenty-one years.

The testator, William Carver, by his will executed before the Will Act, 1837, after bequeathing all the stocks, funds and securities of which he should die possessed to trustees, and directing them thereout to appropriate and apply three several sums of 30,000*l.*, 3*l.* per cent. consolidated annuities, each upon certain trusts therein mentioned, gave and bequeathed the residue of his said stocks, funds and securities (subject to a certain annuity) to the trustees upon trust to pay and apply the dividends, interest and annual produce thereof as they in their discretion might deem necessary for or towards the maintenance and education of all and every of his grandchildren, the children of his two sons, William Carver and James Carver, until they should severally attain the age of twenty-one years; and he directed that the surplus dividends, interest, and annual produce which should not be wanted and applied for the purpose last aforesaid, should be invested by the trustees in or upon the parliamentary stocks or public funds in Great Britain, or at interest upon government securities at their discretion, with full power to vary the securities. And when and as each of his said grandchildren should attain the age of twenty-one years, upon trust, and by the sale of such part of the stocks, funds and securities then standing in their names or name as might be necessary for the purpose, to raise and pay to each of his said grandchildren so

attaining the age of twenty-one years as aforesaid, the sum of 2,000*l.* And the testator declared that when and so soon as all and every his said grandchildren should have attained the age of twenty-one years, the trustees should stand possessed of the whole of the stocks, funds and securities then standing in their names upon any of the trusts of his will (over and above the three several sums of 30,000*l.* three per cent. consolidated bank annuities thereinbefore disposed of) upon trust to pay, transfer, divide and make over the same respectively, and the dividends, interest and annual produce thereof, unto, between and amongst all and every his said grandchildren to and for their own absolute use and benefit as tenants in common and not as joint tenants: provided that if he should have only one grandchild who should live to attain the age of twenty-one years, then such one upon attaining that age should have and be entitled to the whole of the stocks, funds and securities, and the dividends, interest and annual produce thereof to which his grandchildren, if more than one should have attained the age of twenty-one years, would have become entitled. And he declared that each of his grandchildren, upon their severally attaining the age of twenty-one years, should take vested interests under his will: provided that in case any or either of his grandchildren should at any time during minority go or be taken beyond the seas for the purpose of being educated in any foreign country or for any purpose whatever, and should remain beyond the seas or in any foreign country for any purpose whatever more than three calendar months in any one year, then and in every such case and thenceforth the claim, right and title of each and every of such grandchildren, so going or being taken beyond the seas, to maintenance and education out of or in respect of any monies or property to which they might be entitled under his will should cease, determine and become forfeited, but so, nevertheless, that such forfeiture should not in any respect affect the right of such grandchild or grandchildren to the principal.

Both the sons survived the testator, who died in 1837. William had only five children, all of whom were born before the

testator's death, and the youngest of whom attained the age of twenty-one years in 1848, when James was still a bachelor.

The bill was filed on behalf of the children of William and the issue of some of them, and prayed a declaration that as the youngest grandchild *in esse* at the death of the testator had attained twenty-one years of age, the period for distribution of the residuary fund had arrived, and that the same might be divided amongst the plaintiffs accordingly.

At the hearing of the cause for further directions,

The Solicitor General and *Mr. J. V. Prior*, for the plaintiffs, argued that the latter were the only persons entitled to the trust funds, as having been born at the death of the testator and before his youngest grandson, then *in esse*, had attained twenty-one years of age.

They referred to *Mr. Jarman's Treatise on Wills*, vol. 2, p. 78; and cited *Hughes v. Hughes* (1) and *Elliott v. Elliott* (2).

Mr. Wood and *Mr. E. Cooke* appeared for the trustees of the will, and

Mr. Karlake, for an incumbrancer on one of the plaintiffs' shares.

WIGRAM, V.C.—In cases of this kind I have always understood and I believe it to be the rule, that where a testator is found to have given two inconsistent directions, and says, "that the children* or (which is the same thing) all the children shall participate in the fund," and then directs that there shall be a division when and so soon as each attains twenty-one, in that case you must do one of two things, you must either sacrifice the direction which gives a right to distribution at twenty-one, or sacrifice the intention that all the children shall take. The Court has decided in favour of the eldest child taking at twenty-one as the will directs, and sacrifices the intention that all the children shall take.

In this case, the testator has given the residue to all the children of his two sons when the youngest shall attain the age of twenty-one years. There is a cer-

tain number of children, and when the eldest attains twenty-one, this inconvenience arises, namely, that the maintenance of the eldest child ceases, but he cannot, as the youngest child has not attained twenty-one, claim a distributive share of the fund. The question is, how long is he to wait? If you can confine the objects of the testator's bounty to children of his sons living at his death (which I am quite clear you cannot do in this case, independently of the fact that there is one son who had no children at that time), then you might arrive at the conclusion which I have already mentioned, namely, that the moment the youngest attains twenty-one, the period pointed out for division arrives. If you once admit that a child born after the death of the testator may take, you let in all the inconvenience, and the eldest child may have to wait for an indefinite time, so long as children continue to be born. How, in that case, can you limit the class entitled in the way suggested, which is, that the moment the youngest child *in esse* attains twenty-one, there is to be a division, although there may be an unlimited number of the children born after that period? I do not see how the inconvenience pointed out can be avoided.

With respect to the case of *Hughes v. Hughes*, it appeared to me at first, that, although the language of the Court in the judgment is in favour of the view I take of the case, the decree, as drawn up, was different. But it is not different, for it lets in all children—whether it means children *in esse* or children at any time born of the daughter, in that case, I do not know. That is open in the decree; and it is open to the construction that every child of the daughter in that case took a distributive share.

I see no principle upon which a distribution can be demanded, in the case before me, merely because the youngest grandchild *in esse* at the testator's death has attained twenty-one years of age.

By the decree it was declared that, according to the true construction of the testator's will, the plaintiffs, as representing the existing children of the testator's son William, were not entitled to a divi-

(1) 3 Bro. C.C. 434.

(2) 12 Sim. 276; a. c. 10 Law J. Rep. (N.S.) Chanc. 363.

sion of the trust funds in the cause in exclusion of any other children who might thereafter be born of either of the testator's two sons James and William; but that until some such other child should be born, the plaintiffs were entitled to the income of the trust funds, and that they would be entitled to the principal thereof if no other such child should be born and attain the age of twenty-one years.

WIGRAM, V.C. }
1849. } GRIFFITH v. LUNELL.
Dec. 4. } GRIFFITH v. RICKETTS.

Evidence—Production of Documents at the Hearing—Subpœna duces tecum—24th General Order of May 1845—Lien.

A person in possession of documents may be served with and examined at the hearing upon a subpœna duces tecum, under the 24th Order of May 1845; but,

Semble—that the examination must be confined to questions relating to the mere purpose of production of the document.

If such person admits possession, but objects to produce the document upon the ground that he has a lien upon it, the Court will not make an order for its production.

At the hearing of the cause (reported ante, p. 100) a question arose upon the production of the mortgage deeds of the 5th and 6th of December 1800, whereby Edward Griffith the elder had mortgaged the property (the subject-matter of the suit) to Richard Ricketts. The deeds were in the possession of a Mr. Hinton, the solicitor of certain parties claiming under R. Ricketts, but not of any of the present defendants. The plaintiff had served Mr. Hinton with a *subpœna duces tecum* in the form prescribed by the 24th Order of May 1845 (1), to produce the mortgage deeds at the hearing of the cause.

The defendants' counsel objected at the hearing to the proposed calling of Mr. Hinton, as being novel and contrary to practice.

(1) Ord. Can. 293; 14 Law J. Rep. (N.S.) Chanc. 287.

The following cases were cited on behalf of the plaintiff:—

Davis v. Dale, 4 C. & P. 335.

Summers v. Moseley, 2 Cr. & M. 477; s. c. 3 Law J. Rep. (N.S.) Exch. 128; 4 Tyr. 158.

Thompson v. Moseley, 5 C. & P. 501.

Doe d. Gilbert v. Ross, 7 Mee. & W. 102; s. c. 10 Law J. Rep. (N.S.) Exch. 201.

Maber v. Hobbs, 1 You. & C. Exch. 585; s. c. 5 Law J. Rep. (N.S.) Ex. Eq. 45.

Dec. 4.—WIGRAM, V.C.—The plaintiff in this case claims to be mortgagor of lands which are in the possession of the principal defendant in the cause, which lands he seeks by his bill to redeem. From the nature of the defence made by the defendants, it has been deemed necessary by the plaintiff to prove the original mortgage deed, dated some time in the year 1800. In order to do this he has served a gentleman named Hinton with a *subpœna duces tecum*, to produce, at the hearing of the cause, a deed described in the subpœna. Of Mr. Hinton the Court knows nothing. He has not been examined upon interrogatories before the Examiner to prove that he has in his possession the deed described in the subpœna, nor, if the deed be in his possession, to prove from whom he got it, nor in what character, nor anything else relating to himself or the deed. Of the deed itself I know nothing except by the description of it in the subpœna. At the hearing of the cause on a former day, the Counsel for the plaintiff called Mr. Hinton upon the subpœna, and was proceeding to ask him questions (I do not say to examine him as a witness) touching the deed. This was objected to, on the part of the defendants, as being a course unknown in the practice of the court; and as I had not myself, and also ascertained that the Registrar then present had not, any recollection of a like question having arisen, and as the result of the cause might mainly be affected by my decision, I desired the cause to stand over to give me an opportunity of making an inquiry. I will now state the conclusion to which I have come as to the course to be pursued:

a conclusion which the parties may correct by appeal, if it be erroneous. I have not been able to find any one who recollects the point having arisen before. Two propositions, I think, may be safely stated. One is, that this subpoena lies. The form of it is given at the end of the Orders of May 1845. The second proposition is, that the plaintiff cannot by means of the subpoena obtain more than the mere production of some paper or parchment by the witness. The witness has not been sworn, and cannot, according to the practice of the court, be sworn or examined as a witness at the hearing of the cause. The production of the paper or parchment by the witness will put the plaintiff in no other position than he would have been in if he had obtained the possession of the instrument out of court and produced it at the hearing, except that it comes out of the possession of a Mr. Hinton, of whom the Court knows nothing. The question, then, is reduced to this, whether the plaintiff, for the mere purpose of obtaining the production of the instrument, has not a right to ask the witness in this court the same question which he might have asked an unsworn witness in a court of law, in precisely the same circumstances. My opinion is, that the plaintiff's Counsel has a right first to call the witness upon his subpoena; secondly, to ask him whether he produces the deed described in the subpoena; and thirdly, if he should not produce it, to ask him why he does not, or other like questions confined to the mere purpose of production. Beyond this I am not called upon to express any opinion at the present moment. If the witness, admitting the possession of the document, should refuse to produce it, the plaintiff's Counsel must determine whether he will try to enforce its production, or tender secondary evidence of the deed, which, according to a late case, he may possibly have a right to do. But upon this point I, at present, give no opinion.

Mr. Hinton subsequently appeared upon the subpoena, and admitted possession of the deeds in question; but he objected to produce them, and stated that he had a lien upon them as against the estate of C. R. Frost, deceased.

WIGRAM, V.C. refused to make an order for the production of them, and said that such an order would not be made as against a mortgagee, and the case of a lien was in substance the same.

K. BRUCE, V.C. { *Ex parte* THE DEAN AND
July 16. { CHAPTER OF GLOUCESTER.

Ecclesiastical Corporation — Lease — Railway Company.

A railway company took some land which had been demised by the Dean and Chapter of G, for twenty-one years to a lessee on a beneficial lease. The company settled separately with the lessee, and purchased the reversionary interest of the Dean and Chapter, and this purchase-money was ordered to be invested in consols:—Held, that the dividends to accrue on this stock until the expiration of the term were not payable to the Dean and Chapter, but ought to be accumulated.

The Dean and Chapter of Gloucester granted a beneficial lease of land to a lessee for twenty-one years. A part of this land was, some time before the expiration of the lease, taken by a railway company. The company purchased the lessee's interest separately, and purchased the reversionary interest of the Dean and Chapter for the sum of 2,500*l*.

This was the petition of the Dean and Chapter, praying that the 2,500*l*. might be invested, and that the dividends to accrue after such purchase might be paid to them.

Mr. C. C. Barber, for the petition, stated the above circumstances, and asked the Court for an order according to the prayer.

KNIGHT BRUCE, V.C. said that he thought that, after providing for the payment to the Dean and Chapter of the rent reserved, if such a provision was necessary, the remainder of the dividends ought to be accumulated until the expiration of the period of twenty-one years for which the lease had been granted, and added to the principal, and that the order ought to be taken in that form.

WIGRAM, V.C. }
Jan. 11. } CUMING v. BISHOP.

Witness—Examination—Evidence.

After publication of his evidence in chief, a witness in the cause may be again examined as to matters upon which he has not been previously examined.

This was a motion, on behalf of the plaintiffs, for liberty to examine a witness named John Nash before the Master, Examiner, or Commissioners in the cause, notwithstanding his having been examined in chief; such new examination being confined to the proof that Thomas Crofts, in the pleadings mentioned, was the agent of Mary Dean at the time he witnessed the settlement of account stated in a certain exhibit in the cause.

The plaintiffs claimed the sum of 600*l.* and interest to be due to them from the estate of John Dean deceased, upon which sum Mary Dean, also since deceased, had, as his executrix, paid certain interest. A settlement of account between the plaintiffs and Mary Dean, as contained in the Exhibit A in the cause, had been attested by Thomas Crofts, whose handwriting and signature to it as a witness the plaintiffs had examined John Nash to prove.

At the hearing, on the 5th of February 1849, it was, amongst other things, referred to the Master to take certain accounts. During the reference the Master required evidence to be furnished by affidavit that Thomas Crofts was the agent of Mary Dean at the time he witnessed the settlement of account. The plaintiffs accordingly procured the affidavit of John Nash to that effect, after he had been examined in chief as above mentioned; but the counsel for the defendants objected to the affidavit being read without the order of the Court.

The Solicitor General and Mr. Mackeson, in support of the motion, cited—

Metford v. Peters, 8 Sim. 630; s. c. 7 Law J. Rep. (N.S.) Chanc. 44.

Whitaker v. Wright, 3 Hare, 412; s. c. 13 Law J. Rep. (N.S.) Chanc. 367.

Earle v. Pickin, 1 Russ. & Myl. 547; s. c. 1 Law J. Rep. (N.S.) Chanc. 178.

Cass v. Cass, 4 Hare, 278; s. c. 14 Law J. Rep. (N.S.) Chanc. 223.

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Mr. R. Pryor, for the defendants, opposed the motion, and cited—

Rowley v. Adams, 1 Myl. & K. 543; s. c. 2 Law J. Rep. (N.S.) Chanc. 143.

Stanney v. Walmsley, 1 Myl. & C. 361.

The Solicitor General replied, and stated that the form of the order, in a similar case, had been much considered by his Honour the Vice Chancellor Knight Bruce, in the case of *Manson v. Burton* (1).

WIGRAM, V.C. said, that there could not be any objection to the examination of the witness on matters upon which he had not been previously examined, the Master settling the interrogatories.

An order was ultimately taken in the form of that made in *Manson v. Burton*, to examine the witness *vidv voce*, instead of upon interrogatories.

WIGRAM, V.C. }
Feb. 21. } BINNS v. PARR.

Motion—Payment into Court, after Hearing—Admissions in Answer.

After the hearing, and before the cause came on for further directions, the plaintiff moved, on admissions by the defendant in his answer, for payment of a sum of money into court:—Held, that such admissions were not alone sufficient to induce the Court to make the order, and the motion was refused.

This was a motion, after the cause had been heard and a decree made ordering certain references to the Master, and reserving further directions, for the payment into court of a sum of money which the defendant, by his answer, admitted to be in his possession.

The Solicitor General and Mr. Speed, for the motion.

Mr. Wood and Mr. Goodeve, contra, objected that such motion was not regular after a decree had been made which did not order the payment of the money into

(1) 2 You. & Col. C.C. 647.

court. The motion might have been made upon the defendant's answer at the hearing, or it might still be made upon his examination. The present motion, if granted, would, in substance, vary the decree.

They cited *Hatch v. —* (1).

The case of *Burn v. Bowes* (2) was also mentioned to the Court.

The Solicitor General replied.

WIGRAM, V.C. said he did not see any reason, in principle, against making the motion after the hearing. The reason why the Court did not order payment of money into court upon admissions in an answer without motion was, that until the accounts were taken the defendant might have an opportunity of discharging himself by affidavits. The motion was not open to the objection that the order, if made, would vary the decree, because the order for payment of money into court upon admissions in an answer, was not the subject of the decree, but was always made by interlocutory application. He should, however, on a point of practice follow the case of *Burn v. Bowes*, and refuse the motion.

M.R. }
Feb. 7, 25. } SCOTT v. WHEELER.

Production of Deeds — Possession not admitted—Bill of Revivor—Administrator of Deceased Defendant.

An order for the production of deeds, &c. will not be made against the administrator of a deceased defendant, though the suit has been revived, and though an order has been previously made against the defendant himself, there being nothing to shew that they were in the possession of the administrator.

This was a motion that William Wheeler, the administrator of George Wheeler, deceased, might produce divers deeds and papers, which the deceased, who was a defendant to the suit, had by his answer admitted to be in his custody.

On the 28th of March 1849 an order was made for the production of the deeds at the office of the defendant's solicitor.

(1) 19 Ves. 116.

(2) 6 Law J. Rep. (N.S.) Chanc. 275.

On the 17th of April 1849, before the deeds had been inspected, George Wheeler, the defendant, died intestate.

On the 26th of October 1849 letters of administration to the estate and effects of George Wheeler were granted to his son, William Wheeler.

On the 7th of November 1849 the plaintiff filed a bill of revivor against William Wheeler, but did not pray for any answer from him. The subpoena was duly served, but William Wheeler neglected to appear; and on the 26th of November 1849 the plaintiff entered an appearance for him by default; and on the 10th of December 1849 an order for reviving the suit was made.

Mr. Anderson, on behalf of the plaintiff, now asked that an order for the production of deeds, &c., similar to that which had been made against the deceased, might be made against the administrator.

Mr. Swinburne, on behalf of the administrator.—No order can be made upon this application. There is nothing before the Court which shews what has become of the deeds and papers, or that the administrator has possession of them.

THE MASTER OF THE ROLLS.—This is by no means a matter of course. No admission has been obtained from the administrator that he has the documents; he may not have them. I can make no order.

See *Rodick v. Gandell*, 10 Beav. 270.

WIGRAM, V.C. }
March 8, 11. } DIXON v. PYNER.

Master's Jurisdiction—Sale under Decree, Conduct of—Master's Discretion.

The Master has a discretion to give the conduct of a sale under a decree to other persons instead of the plaintiff, for the benefit of the parties interested.

Therefore, where a plaintiff not being guilty of any default or misconduct obtained a decree for the sale of lands vested in trustees for sale, with liberty for himself to bid, and the Master gave the conduct of the sale to the trustees instead of the plaintiff, it was held, on motion by the plaintiff, that

the Master had a discretion to confide the conduct of the sale to other persons besides the plaintiff, where such course would be most beneficial to the parties interested in the proceeds, and it being shewn that considerable expense would in the present case be thereby saved, the Court refused to disturb the Master's decision.

By the decree made at the hearing of this cause, the Master was directed to sell certain estates, the subject-matter of the suit, with liberty for the plaintiff to bid at the sale.

The bill was filed to carry into execution the trusts of certain indentures, whereby the estates directed to be sold had been conveyed by the plaintiff and his father, a defendant in the suit, to trustees, also defendants, upon trust to sell and divide the proceeds between the plaintiff and his father in certain proportions.

The bill charged collusion between the father and the trustees, and that the amount allotted to the father was excessive and disproportioned to his interest in the property. The plaintiff applied to the Master for the conduct of the sale; but it was given to the trustees, upon the ground, as it was stated, that they could conduct it at less expense than the plaintiff.

Mr. Lloyd and Mr. Shebbeare, for the plaintiff, now moved for an order that he might have the conduct of the sale. They contended that he, as plaintiff, was entitled to conduct the sale. Collusion between the father and the trustees was charged by the bill, and afforded an additional reason for not intrusting the sale to the latter. Besides, it was the uniform practice of the Court to give the carriage of the decree to the plaintiff, unless he had been guilty of default or other misconduct.

Mr. Wood and Mr. Elmsley, for the defendant, the plaintiff's father, opposed the application, and submitted that the Master had a discretion to confide the conduct of the sale to such parties as he should consider most proper. Under the circumstances of the case, the Master had concluded that the trustees were, in this instance, the proper persons for that purpose, and that considerable expense would be thereby saved to the parties interested in the property.

Mr. Hetherington, for an incumbrancer on the share of the plaintiff, also opposed the motion.

The Solicitor General and Mr. H. Clarke appeared for the trustees.

WIGRAM, V.C. (after briefly referring to the above facts) said, The plaintiff, I am inclined to think, has waived his right to have the conduct of the sale by obtaining liberty to bid. It appears quite of course that the trustees, and not a person having liberty to bid, should have the conduct of the sale. The Master, although that point was not taken before him, has given the conduct of the sale in the present case to the trustees. This case is distinguishable from one in which by the common practice of the Court the plaintiff is entitled to have the conduct or carriage of the decree which he has himself obtained. The question here is, whether, the plaintiff not being in default, the Master has a discretion to give the conduct of the sale to any other party than the plaintiff. Upon this point I have consulted several of the Masters, who are all confident that they have a discretion, and they say that, upon being applied to for such purpose, they are in the habit of giving the conduct of a sale directed by a decree, to other parties than the plaintiff whenever that course is shewn to be most beneficial to the parties interested. On the ground, therefore, of want of jurisdiction in the Master, I shall not alter what has been done in the present case.

The general rule of the Court where a receiver has been appointed by the Master, and there is no question of property to be decided, but merely a question of discretion, is never to interfere unless it can be shewn that there has been an injurious exercise of such discretion. In the present case the Master has proceeded upon strong grounds. It appears that ten years have elapsed since the trusts for sale were created, and in the course of that time several attempts to sell the property have been made, abstracts have been prepared by the solicitors of the trustees, and it appears that a great number of abstracts is required to shew the state of the title. The trustees or their solicitors having prepared these abstracts, and having all the knowledge of the state of the title,

are in a condition, without further expense, to lay it properly before the Master. Considering, therefore, the expense which would result from a different course, I shall not disturb the decision of the Master.

Motion refused.

WIGRAM, V.C. }
Feb. 27. } HUNTER v. DANIEL.*

Costs—Taxation—Revivor—Decease of Co-defendant.

One of several co-defendants whose costs of the suit had been ordered to be paid by the plaintiff, and who had carried in a joint bill of costs, died before the taxation was completed:—Held, on motion, that the surviving co-defendants might proceed with the taxation of their own costs without reviving the suit.

This was a motion that the taxing Master might be directed to continue the taxation of the bill in this suit, notwithstanding the death during the taxation of one of seven co-defendants, to whom and the survivors by name the costs of the suit had been ordered to be paid by the plaintiff. The defendants had carried in a joint bill of costs, and upon the death of one of them the taxing Master refused to proceed with the taxation. The suit had not been revived, and the present motion was made on behalf of the surviving defendants.

The plaintiff had appealed to the Lord Chancellor from the decision of the Vice Chancellor dismissing the bill, and the cause had been struck out of his Lordship's paper, upon the ground that the suit had abated by the death of one of the defendants. It was stated that the plaintiff intended to revive the suit as soon as an administrator of the deceased defendant should be appointed.

Mr. Elmsley, for the motion, argued that the taxation ought to proceed whether the right to the costs was joint or several, because, if joint, the right would survive: and, if several, the survivors could claim to be paid their respective portions. In

Robertson v. Southgate (1) the motion was made on behalf of the personal representative of a deceased defendant, and was refused; but in *Meredyth v. Hughes* (2) it was decided, that the death of one of several persons ordered to pay costs did not discharge the survivors.

The case of *Ex parte Bishop* (3) was also cited.

Mr. Southgate, for the plaintiff, opposed the motion upon the grounds, that there was neither precedent nor authority for the application, although the necessity for it must have arisen in numerous cases; that the deceased and surviving defendants were not jointly interested in the subject-matter of the suit, which had been instituted for the specific performance of a contract to sell their several interests to the plaintiff; that the motion was oppressive, as the plaintiff would revive the suit for the purpose of the appeal whenever an administrator should be appointed, and the taxing Master would then continue the taxation in the ordinary mode; and, lastly, that the notice of motion was given on behalf of six defendants only, for an order that the Master might be directed to proceed with the taxation of the bill of the seven, to which the six could not be entitled, as the representative of the deceased would not be bound by such taxation unless present.

Upon the first ground, it was argued, that the authorities cited and collected in *Mr. Daniell's Chancery Practice* (4) related only to cases where the party to pay had died. The death of a party to receive costs was very different. The order to pay the seven defendants would not be satisfied by payment only to six.

WIGRAM, V.C., after expressing some surprise at the difficulty felt by the taxing Master, said, that if the objection to the form of the notice of motion was urged, leave would be given to amend. The fact that the defendants were separately and not jointly interested in the subject-matter of the cause was not material to the present question. The order was to tax the costs

(1) 18 Law J. Rep. (N.S.) Chanc. 404; a. c. 7 Hare, 109.

(2) 3 You. & J. 188.

(3) 8 Ves. 333.

(4) Vol. 2. p. 1325 (Headlam's edit.)

* Reported on demurrer, 14 Law J. Rep. (N.S.) Chanc. 194; a. c. 4 Hare, 420.

of seven co-defendants. If it had been to tax the costs of two or three executors or trustees (being defendants), and one of them had died during the taxation, there could be no doubt that the taxation would have proceeded notwithstanding his death. What the effect of the taxation of the costs of the seven might be, if the plaintiff, in order to proceed with the appeal, should procure the appointment of an administrator *ad litem*, was certainly deserving of consideration; but there could not be any difficulty in directing the taxing Master to proceed under the decree with the taxation of the surviving defendants, if the latter would be content with an order to that extent.

Ordered accordingly.

WIGRAM, V.C.
1849.
June 9;
July 6.

DEERE v. ROBINSON.

Costs—Taxation—Solicitor and Agent.

Two of the defendants, the solicitors in the cause of a co-defendant, from whom they had severed in their defence, appeared by their own solicitor, and agreed with him for the allowance of part of his profits in the cause. The suit having been dismissed, with costs, as against all three defendants, two bills of costs were carried in—one for those of the two solicitors defendants, and another for those of their co-defendant. The taxing Master required evidence of the fact of alleged agency between the two solicitors, defendants, and their solicitor in the cause, and ultimately blended the costs of the three defendants into one bill, allowing only costs of agency as between the two defendants and their solicitor:—Held, on petition, that the taxing Master was right, and had a discretion in requiring evidence of the fact of agency, and that in cases of agency the solicitors could only carry in one bill of costs.

In this cause two petitions were presented, praying that the taxing Master might be directed to review his certificate of the costs payable to the petitioners.

The bill was filed against certain defendants, and amongst them the petitioners Laura Elizabeth Hall and her two solicitors. The petitioners had severed in their defence,

and an order had been made for dismissal of the bill as against the petitioners, and for payment of their costs out of the residuary estate of the testator mentioned in the pleadings.

The other facts sufficiently appear from the Vice Chancellor's judgment.

Mr. Wood, Mr. Bacon, Mr. Leach, and Mr. Bird appeared for the several petitioners.

The Solicitor General and Mr. A. Smith opposed the petitions.

July 6.—WIGRAM, V.C. (after stating the facts) said, I assume in this case that the interests of the petitioners were so distinct as to justify them in having a separate solicitor. This has not been controverted. It appears that separate bills of costs were carried in for taxation: one by the solicitor who appeared for the two petitioners in the first petition, and the other by those two petitioners for L. E. Hall. The solicitor for the parties interested in the estate of the testator in the cause, suggested that the first bill of costs ought not to be allowed in full, unless the three solicitors would satisfy the Master by affidavit that the solicitor, who carried in the first bill of costs, was not, in fact, the agent of the other two; or that no agency existed between them as to the costs of the suit. The Master, influenced, as it is said, by the circumstance that he found precisely the same observations annexed to the briefs furnished to the counsel for L. E. Hall, and to the counsel for the other two petitioners, her solicitors, yielded to this suggestion. Upon the matter coming before me on former petitions, I directed the taxing Master to proceed under the order for taxation, and make such certificate as he should think fit. The only observation I trusted myself to make upon that occasion was, that the two petitioners and their solicitor must obviously have it in their power to set the matter at rest, if they thought proper so to do. The Master, in making his certificate, has considered and treated the solicitor of the two petitioners, who were the solicitors of L. E. Hall, as their agent, and has allowed to the two petitioners such costs only as would have been allowed to them if such agency had been admitted or proved. Of this the two petitioners and L. E. Hall complain: the former

[For the report of the above case, see
19 Law J. Rep. (N.S.) Bankr. p. 3.]

L.C. }
Jan. 15, 18. } STEVENS v. KEATING.

Injunction, Costs of—Costs in the Cause.

A bill was filed to restrain the infringement of a patent, and an injunction was obtained, upon motion, the defendants appearing and opposing, and the plaintiffs undertaking to bring an action to try their right at law. The plaintiffs failing to establish their right at law, the bill was ultimately dismissed, with costs, for want of prosecution:—Held, upon appeal, that the defendants were entitled to their costs of resisting the motion for an injunction as costs in the cause.

This was an appeal from an order of the Vice Chancellor of England, dated the 10th of November 1849, disallowing the defendants, after dismissal of the bill, the costs of opposing a motion for an injunction which had been granted by the Court.

The bill was filed, in November 1846, to restrain the defendants, the present appellants, from infringing the alleged patent rights of the plaintiffs. The plaintiffs moved, upon notice, for the injunction, and on the 18th of January 1847, the Vice Chancellor granted the injunction, the plaintiffs undertaking to bring such action at law as they might be advised. Upon appeal, the Lord Chancellor confirmed that order in other respects, but directed the action to be tried in Middlesex, at the next sittings after the then current term, and reserved the consideration of the costs of the application before him until after the trial, with liberty to apply. The plaintiffs not having proceeded to trial within the time limited, the Lord Chancellor, upon motion on the 29th of July 1847, dissolved the injunction, but directed the defendants to keep accounts of the articles manufactured by them. The action was subsequently tried, and a verdict found for the defendants, on the ground of defect in the specification of the patent. On the 16th of December 1848, the Lord Chancellor, upon the motion of the defendants, ordered that so much of the order of July 1847 as directed that accounts should be kept, should be discharged; but declined to make any order as to the costs of the motions of the 18th of January and the 29th of July 1847. On the 18th of

January 1849, by the order of the Vice Chancellor, the bill was dismissed, with costs, for want of prosecution. The taxing Master, under that order, allowed the defendants the costs of the two motions of the 18th of January 1847 and the 29th of July 1847. On the petition of the plaintiffs, the Vice Chancellor, on the 10th of November 1849, referred it back to the Master to review his certificate in respect of the allowance to the defendants of the costs of the motion of the 18th of January 1847.

The defendants now appealed from that order.

Mr. Stuart and Mr. Glasse, for the appellants.—The plaintiffs having failed in the claim which they set up by their bill, must be considered as wrong *ab initio*; and therefore the defendants, in accordance with the general rule, are entitled to the costs of the original application for the injunction, notwithstanding they were unsuccessful in their opposition to it at the time. It is not the practice of the Court to make any order as to costs at the time of granting an injunction, but they are left to abide the event of the suit; for though the rule laid down by Sir J. Leach (1), "that the party making a successful motion is entitled to his costs, as costs in the cause; but the party opposing it is not entitled to his costs, as costs in the cause," seems to be an authority for the Vice Chancellor's decision, yet the subsequent words of the memorandum shew that the rule is not applicable to the case of injunctions; namely, "that the Court very rarely gave any special directions with respect to the costs of a motion for the purpose of obtaining, continuing, or dissolving an injunction to stay proceedings at law, leaving the costs of such motions to abide the event of the suit." In *Finden v. Stephens* it was held (2), reversing the decision of the Vice Chancellor of England (3), that the Master had rightly allowed to the defendant the costs of preparing to resist the motion for an injunction.

Mr. Roll and Mr. Follett, contra, contended, that the costs of the motion in

(1) 1 Sim. & S. 357.

(2) 17 Law J. Rep. (N.S.) Chanc. 342.

(3) 16 Law J. Rep. (N.S.) Chanc. 526; a.c. 16 Sim. 40.

question were governed by the first part of the memorandum of practice promulgated by Sir J. Leach. For, as the case stood at the hearing of the original motion, the defendants' resistance was improper and vexatious; and further, if the defendants considered themselves entitled to such costs, they should have taken care that they were specially reserved. They cited also *Lewis v. Armstrong* (4).

The LORD CHANCELLOR (without calling for a reply.)—The first question is, whether the costs are costs in the cause. The rule contended for, if it exist, must be a general one; and I am quite clear that when this case was before me in July 1847, I did not intend to interfere with the general practice of the Court as to costs. The motion was made by the plaintiffs, who by their bill asserted their right to a patent; and the Vice Chancellor, in the first instance, and this Court afterwards, thought that sufficient case was shewn to protect the plaintiffs in the enjoyment of this right by injunction, pending the litigation at law. I afterwards dissolved the injunction, not because it was not properly granted at the first, but because I thought the subsequent conduct of the plaintiffs had disentitled them to it. That injunction was granted upon the assumption of a right which was afterwards displaced by the result of the trial at law. A motion was then made before me, which brought forward the whole merits of the case, and in effect asked that I should dispose of the motions and the costs. For some reason or other, I did not think it expedient at that time to dispose of the question of costs. The plaintiffs not being able to dispute the result of the trial at law, the bill was dismissed, with costs; and the only question now is, whether the defendants are not entitled to the costs of the order by which the injunction was originally granted, and very properly as the matter then stood, upon an assumption of a right which the plaintiffs have been unable to maintain; and, consequently, the whole ground for granting the injunction is cut away. If the rule is as contended for on the part of the plain-

tiffs, it is a rule which must work great injustice, and which ought at once to be corrected by a special order of the Court, if necessary. The result of the proceedings shews, that the plaintiffs have got an advantage which they ought never to have had, and in obtaining that advantage they have exposed the defendants to the costs of litigation; and then the bill is dismissed, with costs. To give the defendants the costs of the cause, without giving them the costs of that which is the essence of the cause, would be perfectly idle. The case depends, however, upon the practice of the Court; and if I find upon inquiry that it is the practice of the taxing Masters to allow the costs in question, I shall make an order accordingly.

Jan. 18.—The LORD CHANCELLOR stated that he had caused inquiries to be made of the taxing Masters, and had received a certificate from them that the costs of opposing an application for an injunction which is granted, form part of the costs of the suit; and that, therefore, the order of the Vice Chancellor in this respect must be reversed.

K. BRUCE, V.C. } CATON v. RIDEOUT.
June 11. }

Administration Suit — Allowances to Executors on their own Affidavit without Vouchers.

A sum of 27l. for wages due to the servants of a testator at his death, and another sum of 16l. for keeping a house for the repairs of which the testator's estate was liable, were allowed to an executor in passing his accounts (under the circumstances of the case) on his own affidavit and without vouchers.

Under the decree made in this cause it was referred to the Master to take an account of the personal estate of the testator in the cause come to the hands of the defendant Mrs. Rideout, his executrix.

It appeared that the testator in the cause was a clergyman, and that he had lived in the rectory-house of a living of which he was the incumbent, and that the income belonging to him and his wife together had been considerable.

(4) 3 Myl. & K. 69; s. c. 5 Law J. Rep. (N.S.) Chanc. 2.

Mrs. Rideout, in the Master's office, claimed to be allowed the following sums: "For the wages of the gardener, the lady's maid, the housemaid, and the boy, 27*l*. For keeping the rectory-house after the testator's death, 16*l*. 16*s*." For these items the defendant had no vouchers, and they were verified by her affidavit alone.

The Master, in his report, had disallowed the sums before mentioned, on the ground of there being no vouchers.

The defendant took exceptions to the report as to these and many other items, which now came on to be heard.

Mr. R. Palmer and Mr. Greene, for the plaintiff.

Mr. J. Parker and Mr. T. Miller, for the defendant.

KNIGHT BRUCE, V.C. said that something must have been due to the servants for wages at the time of the testator's death. As the testator had lived in a rectory-house, and his estate would have been liable for dilapidations, it was reasonable that a person should be put in the house to take care of it. He thought that it would not be too much to allow these items, although no vouchers had been produced. Considering the nature of the establishment and the position of the parties, he thought that vouchers might be dispensed with.

L.C. }
1849. } SAUNDERS v. WALTER.
Nov. 26. }

Practice—Defendant of Unsound Mind—Guardian ad litem—32nd Order of May 1845.

Defendants of unsound mind, but not found so by inquisition, on the last day allowed them for putting in their answer, obtained from the Master an order for two months further time to answer, and then obtained, by petition at the Rolls, an order for liberty to sue out a commission to assign them a guardian ad litem. An application by the plaintiff, under the 32nd Order of May 1845, to assign them a guardian ad litem, on the ground of default in not putting in their answer, was refused, with costs.

NEW SERIES, XIX.—CHANC.

This was an application to discharge or vary an order of the Vice Chancellor of England made on the 20th of September 1849.

The present suit was instituted to administer the estate of John Saunders, the testator in the cause. The plaintiff was one of the sons of the testator, and interested under the will, and the defendants were the executors and the remaining children of the testator, two of whom, Maria Saunders and Ellen Saunders, were alleged to be persons of unsound mind. An appearance was entered for the two last-named defendants on the 31st of July 1849.

On the 11th of September following an order was obtained from the Master, giving the defendants two months further time to answer. On the 13th of the same month an order was obtained from the Master of the Rolls, on the petition of Maria Saunders and Ellen Saunders, that the petitioners should be at liberty to sue out a commission to assign them a guardian *ad litem*. On the 20th of September the plaintiff moved before the Vice Chancellor of England that W. S. Masterman, a solicitor, might be appointed guardian *ad litem* for the defendants Maria Saunders and Ellen Saunders.

This application was made under the 32nd Order of May 1845 (1), on the ground that the above-named defendants were in default in not putting in their answer. The Vice Chancellor refused the application, with costs, and the present motion sought to discharge that order.

Mr. Cooper and Mr. J. S. Moore, for the motion, contended that these defendants, being of unsound mind, were not entitled to apply for further time to answer, without first obtaining a guardian *ad litem*; and that, being in default for want of answer, the plaintiff was entitled under the 32nd Order of May 1845 to apply to have a guardian appointed for them.

Mr. Rolt and Mr. Hore, contra, were not called upon.

The LORD CHANCELLOR was of opinion that the proceedings on the part of these

(1) Ord. Can. 296; 14 Law J. Rep. (n.s.) Chanc. 288.

defendants were strictly regular, and he refused the present application, with costs.

L.C. } BAGSHAW v. THE EASTERN UNION
Feb. 1, 9. } RAILWAY COMPANY.

Company — Capital raised for Specific Purposes—Holders of Scrip Certificates—Parties.

*The Eastern Union Railway Company were authorized by various acts of parliament to make various railways, and amongst others, one from Bury St. Edmunds to Norwich, and by two subsequent acts were authorized to purchase "The Hadleigh Junction Railway," and to make a line from Ipswich to Harwich, and to raise for the two last-mentioned purposes, the respective sums of 100,000*l.* and 200,000*l.* At a meeting of the company a resolution was passed, authorizing the directors, for the purpose of purchasing and constructing respectively the two last-mentioned railways, to raise the sums of 100,000*l.* and 200,000*l.*, and to grant scrip receipts for the sums to be subscribed, entitling the holder to become a registered shareholder in a new Eastern Union stock, with a guaranteed dividend of 6*l.* per cent. The plaintiff, a holder of such scrip certificates, filed his bill against the company and the directors, charging that the company was about to apply, and had already applied, part of the sums so raised in the construction of the Norwich line, in violation of the said two acts of parliament and the resolution of the company founded thereon, and praying an injunction against such misapplication. Upon demurrer, by the company, for want of equity, Held, that the plaintiff, as holder of such scrip certificates, had an equity to see the money applied to the specific purposes for which it was authorized by the acts to be raised; and that the resolution stating the purposes for which it was to be raised was binding upon the company.*

This was an appeal from the decision of the Vice Chancellor Wigram, overruling the demurrers of the defendants, the company and the directors.

The case on the original hearing of the demurrers is reported 18 *Law J. Rep.* (N.S.)

Chanc. 193, where the bill and the demurrers are fully stated.

Mr. Wood and Mr. Daniel appeared in support of the demurrers; and

The Solicitor General and Mr. Grove in support of the order below.

Feb. 9, 1850.—The LORD CHANCELLOR.—This is a bill filed by a certain person, calling himself a proprietor of scrip, on behalf of himself and other proprietors of scrip certificates for perpetual 6*l.* per cent. stock 1849, in the Eastern Union Railway Company, and also of such perpetual stock, on behalf of himself and all other owners of scrip certificates in the said stock: and it prays, among other things, to restrain the company and those individuals who are named, being directors of the company, from employing any money which has been subscribed by the plaintiff and the other holders of this scrip towards the carrying on a railway to Colchester, or otherwise than in the direction of the works for which that money was subscribed. Now, the bill is founded, no doubt, upon that equity which I lately considered as properly applied by the Master of the Rolls in the case of the Direct London and Portsmouth Railway Company—*Cohen v. Wilkinson* (1), where a company having obtained an act of parliament and procured subscriptions and advances of money for the purpose of carrying a railway from Epsom to Portsmouth, and afterwards finding out that they could not, or thinking it not advisable to carry on the whole of the line, proposed to do that portion of the line which was between Epsom and Leatherhead only. It appeared they had abandoned the further portion of the line, and therefore there was no intention of carrying on the railway as projected to Portsmouth from Epsom. The Master of the Rolls thought it was a departure from the purpose for which the subscription took place, and that the company were not at liberty so to apply the money which was raised for the purpose of making the whole of the railway the whole of the distance. It came before me, and I was of the same opinion. There the portion of the line proposed to be made

(1) 1 Hall & Twells, 554; s. c. 18 *Law J. Rep.* (N.S.) Chanc. 411.

was part of a line which would have been to be made, if the whole scheme had been carried into effect; but, notwithstanding that the Master of the Rolls' injunction was very carefully framed for the purpose of not interfering with that which would have made the works projected legitimate, it restrained them from carrying on the works, or making the railway between Epsom and Leatherhead, otherwise than for the purpose of effecting the whole scheme; and they having abandoned the whole scheme, of course it operated as an injunction against carrying on the works which they intended to complete; but the mode in which the injunction was framed marked the principle on which the injunction was granted; that although it was part of the work, yet not being part of the work for the purpose of effecting the whole, they ought not to be permitted to go on with it. The case made by the bill, in some particulars, which I shall have occasion to refer to, is this: that whereas a previously existing railway company thought it desirable to effect two branch railways connected with their own, or rather to procure one and make the other, the two acts were passed, 10 & 11 Vict. c. xix. and 10 & 11 Vict. c. ccxxv., authorizing the raising of a sum of money for the purpose of purchasing and completing a branch to Hadleigh, and effecting a new and distinct branch from a junction with the former railway, the Eastern Counties Railway, to Harwich, and the sum to be raised was 100,000*l.* for the one, 200,000*l.* for the other. These two acts, having passed, authorized the raising of the money for effecting the two schemes. Now, the directors, or the company whose agents the officers and directors are, having determined not to carry into operation these two schemes, are applying the money so subscribed to the purpose of carrying on another portion of the original railway and completing it to Colchester. That, undoubtedly, raises the same question; and, if the facts stated in the bill are sufficient for that purpose, they will bring it within the principle of the case to which I have referred, inasmuch as it will be shewn money has been advanced by the plaintiff and those who are represented by the plaintiff for one purpose, which the company are projecting

and intending to apply to another. It is impossible, if those allegations in the bill are sufficient to bring it within that principle, to say that this bill is not maintainable on the same principle upon which I was of opinion the bill in the former case was maintainable. It appears to me, upon reading this bill, that it does most distinctly bring it within this principle. Of course, the facts may be all fictitious; but upon the case made by the bill it appears to me to be very distinctly alleged that this money was raised for the purpose of particular works, and those particular works have been entirely abandoned; and also the intention of applying the money raised under those two acts of parliament for carrying out works totally foreign to the purpose of those who subscribed the money under the provisions of those two acts.

Now, it is in vain to speculate on what motives parties might have had in advancing their money. It may be that the plaintiff here had an independent private reason for promoting a railway to Harwich. It may be that those who subscribed the 100,000*l.* may have had some reason for promoting the purchase of the railway to Hadleigh by the Eastern Union Railway Company; it is impossible to speculate upon that. Every man acts, of course, according to his own view of his own interest and wishes: and the question is, whether the law will permit money advanced for one purpose to be applied, contrary to the wish of the owner of that money, to another; and whether the bill states such a case as brings it within that principle. Now, the bill states so much of the earlier acts as is necessary, which it is not requisite for me to state. There are several acts constituting the Eastern Union Railway Company as it existed in 1847, at the time these two acts were passed. Well, then, the first of those two acts stated in the bill is the Harwich Act. It recites that it would be attended with public advantage "if a railway were made from the line of the Eastern Union Railway, in the parish of Lawford, in the county of Essex, to the port of Harwich, in the same county, with two small branch railways therefrom, and also if a pier or jetty were made." And then, amongst other things, it was enacted, "that it should be lawful

for the Eastern Union Railway Company to raise for the purposes of the now stating act, in addition to the capital which the said company were authorized to raise under and by virtue of certain other acts recited in the now stating act, or any of them, or in addition to any other sum which the said company might be authorized to raise by any act to be passed in the then present session of parliament, any further sum of money, not exceeding in the whole 200,000*l.*; and that the capital thereby authorized to be raised should be considered as a part of the general capital of the company, and should be subject to the same provisions in all respects, whether with reference to the payment or non-payment of calls, or the forfeiture of shares, or otherwise, as if it had been part of the original capital, except as to the amount of such shares and the times of making calls thereon, and the amount of such calls. And that it should not be lawful for the said company, out of any money by this act, or any other act relating to the said railway company, authorized to be raised for the purposes of such act or acts, to pay or deposit any sum of money, which by any Standing Order of either House of Parliament then in force, or thereafter to be in force, might be required to be deposited in respect of any application to parliament for the purpose of obtaining an act authorizing the said company to construct any other railway." Now, this has been observed upon on both sides. It is said, this makes the capital to be raised part of the capital of the whole company. But that is not the question; because although it may, for certain purposes, be described and considered as part of the capital of the whole company, the question is, whether it was not raised for a special purpose, and, therefore, to be applied to that special and particular purpose; or whether it was intended to be left to the discretion of the directors to apply this in common with the original capital for purposes not contemplated by the act, and for purposes which were not intended to be provided for by the act. I consider that the meaning of this enactment is, that there should be a sum of money raised for the purpose of the act, which was to make a railway

to join the Eastern Union Railway from thence to Harwich, and it is only declared to be made part of the capital of the company, not in reference to the mode in which it has to be applied, but as regards all the acts and powers and mode of dealing with the property in the hands of the directors, which are prescribed by former acts. It is to be considered as part of the capital of the company for the purpose of incorporating within this act all the provisions and regulations which are comprised in the former acts, which directs the mode in which the company are to deal with them, and makes other directions relative to the money coming to their hands; for it is in terms that it shall be part of the capital of the company, and subject to the same provisions in all respects, whether with reference to the payment of calls or the forfeiture of shares, or otherwise, as if it had been part of the original capital; that is to say, all the provisions found in the former acts regulating the original capital are to be applicable to the title of the company in dealing with the additional shares. But then comes this provision, which is also very strong to shew that there was no intention of amalgamating this as capital with the original capital, for it provides that it shall not be lawful for the directors to make use of this for any other purpose, namely, for the purpose of depositing money to meet the parliamentary rule as to promoting any other bill. Then, if it was money entirely at their disposal, that would be entirely unnecessary; but it keeps it untouched and unaffected by any purpose which the company might have of using it with a view to making the deposit; keeping it, therefore, strictly for the purposes to which the act refers. Then comes the Hadleigh Act. The Hadleigh Act is very much the same. I observe that the Vice Chancellor relies principally on the Hadleigh Act, and not so much on the Harwich Act. I am not very well aware why that is. It seems to me they are both very much open to the same observation. The bill states as to the Hadleigh Act, that under and by virtue of another act, 10 & 11 Vict. c. xix., intituled "An Act for authorizing the sale of the Eastern Union and Hadleigh Junction Railway to the Eastern Union Railway

Company," the short title of which act is, "The Eastern Union and Hadleigh Junction Railway Sale Act, 1847," the Eastern Union and Hadleigh Junction Railway Company were empowered to sell, and the Eastern Union Railway Company were empowered to purchase the undertaking authorized by the Eastern Union and Hadleigh Junction Railway Act, 1846; and for the purpose of the purchase and execution of the said Eastern Union and Hadleigh Junction Railway, the said Eastern Union Railway Company were authorized to create such an additional number of shares, and to borrow such sum of money as might be necessary for completing such purchase, or for constructing or working the said undertaking, provided the amount to be raised should not exceed the sum of 100,000*l.* That is, in fact, all that is stated in the bill material upon this subject. The Harwich Act is stated more at length in the bill than the Hadleigh Act, but they both come to the same thing. In the one case, of the Hadleigh Act, there is 100,000*l.* to be raised by additional shares for the purchase and completion of the Hadleigh undertaking. And in the other, 200,000*l.* to be raised for the purpose of making the branch to Harwich; in both there was a specific purpose entertained; and that purpose was to be met and accomplished by means of the additional stock to be created under the authority of each of those acts.

Then comes that which is not immaterial, undoubtedly, a statement of the report and the resolutions which led to the issuing of the certificates. The report is stated as being favourable to this scheme, and the resolution is: "That for the purpose of constructing a branch line from Manningtree to Harwich, and for purchasing the Hadleigh Railway under two acts passed in the last session of parliament, the directors be authorized to raise, between the date hereof and the 1st of January 1849, the sums of 200,000*l.* and 100,000*l.*, and to grant scrip receipts for such amounts as may from time to time be paid up in respect of such sums, until each subscriber of 20*l.* and upwards shall have paid the amount he may subscribe in full, and such scrip receipts shall entitle the owner thereof on the 1st of January 1849 to become

a registered shareholder in a new Eastern Union stock for the amount he has subscribed and paid up; upon which he shall receive a guaranteed dividend of 6*l.* per cent. per annum in perpetuity, and have the option at the end of every six months within five years of converting his guaranteed stock into the general stock of the company."

Now, it is impossible to say after that, that these stocks are all united and mixed up in one form. They are as distinct in point of amount, of interest payable, and in point of security as they possibly can be. They are raised specifically for the purpose of those two acts, and they bear a different rate of interest, 6*l.* per cent., and they are guaranteed by the other fund. They have a preference, therefore, over the holders of the other fund, and in a particular event they are to fall into the original stock. That of itself would be quite sufficient to shew that they were never considered as being identical with or part of the original stock—they are perfectly distinct, and this resolution is not only important as constituting part of the contract, but undoubtedly it is a representation operating upon the minds of the parties advancing the money, telling them for what purposes the money was to be raised, and in what manner it was to be secured, and what was to be the amount of the benefit to arise from the subscriptions that they were to make. There was a long speech made by the chairman not material to be taken into consideration now, and there is a resolution of the company who would be the body to deal with the public, inviting them to come forward. It is, no doubt, a representation, binding as between the company itself and those who might advance the money to them. Then, the bill states, "that in pursuance of the said resolution, the whole of the said 300,000*l.* was soon subscribed for, and that all the calls thereon had been paid previously to the 2nd of June 1848, except the sum of 85,500*l.*, which last-mentioned sum falls due and ought to be paid on or before the 30th of December 1848."

Then the bill states, "that the persons who so subscribed, did so confiding in the said resolutions and in the representations of the said J. C. Cobbold and of the other

directors, as to the purposes for which the said perpetual 6l. per cent. stock was to be created, and not supposing that the money to be raised thereby would be applied to any other purposes than those connected with the construction of the said line to Harwich and the purchase of the said line to Hadleigh." Then the bill states that the certificate describes the share as "The scrip for the Eastern Union Perpetual 6l. per cent. Stock 1849." It then recites all the acts: of necessity it does that, because those particular acts refer to the former acts, as containing the directions and provisions which were to be adopted with regard to this newly created stock; of course, it also recites the acts of 1847, under which those new works were to be carried on. Then it recites that the plaintiff having become a purchaser of two shares of 500l. each, left his certificates for the purpose of being registered; and he says that they ought to have been registered, that they have not been registered, and having been left for the purpose of being registered, it was the duty of the company to act upon those instructions. Then comes the allegation, which is the allegation in the bill upon which the equity turns: "That from other inquiries which he has since instituted, he has ascertained, as the fact is, that the directors of the Eastern Union Railway Company have resolved not to proceed with the construction of the said railway from Manningtree to Harwich, and as evidence thereof,"—then he states evidence which may or may not be applicable; but the allegation in the bill, which must be taken to be true for the present, is, "that he has ascertained as the fact is," not that he has received testimony which leads him to believe it is so. It is a distinct allegation, therefore, and the defendants in demurring admit the fact is so, that the directors have resolved not to carry into effect that railway from the Junction to Harwich. It then states "That a majority of the directors of the said company have a strong personal interest distinct from the interest of the said company in completing the Eastern Union Railway to the city of Norwich, and are totally indifferent to the completion of the line to Harwich, and that finding themselves unable to raise sufficient capital for both pur-

poses, they have determined to misapply, and have already to a great extent misapplied the money raised under the said Eastern Union and Harwich Railway and Pier Act, 1847, and under the said Eastern Union and Hadleigh Junction Railway Sale Act, 1847, by employing the same in constructing an extension line to Norwich, and for other purposes not authorized by the said acts or either of them." Then the bill states "that such application is not only contrary to the directions of the said acts of parliament, but is also contrary to the said resolution passed at the said meeting, on the 21st of August 1847, and that it is not within the powers of the said corporation or company, or of any majority of the members thereof, to authorize or sanction such application; and that by the Companies Clauses Consolidation Act the plaintiff is disabled from calling a meeting of the said company without giving thirty-five days' notice thereof." Then the bill states "that the said directors of the said Eastern Union Railway Company have already received 214,500l. or thereabouts, under the power of the two last-mentioned acts, and that they have misapplied the said money by employing it on the works to which the same is not authorized to be applied by the said acts or either of them, and that unless restrained by the order and injunction of this honourable Court, they will in like manner misapply the said sum of 85,000l., which is to be received as hereinbefore mentioned, on the 30th of December instant." Now, that contains all the allegations of title and all the allegations of the misapplication of the monies, upon which the question upon this demurrer depends. No doubt the first question is upon the construction of the acts; because, if the bill be wrong on the construction of the acts, then the allegations would not be material. Being clearly of opinion that those who subscribed for these purposes have a right to have their money applied to the purposes held out to them, not only by those acts, but by the resolutions of the company stating the purposes for which their money was to be applied, and having upon the authority of the case I have before referred to no doubt that the parties have the right which this Court will enforce; and finding the po-

sitive allegation that they not only intend to misapply the money—apply it for other purposes—but that they have actually done so and intend to persevere, on the authority of the case I have referred to, it is equity that the party whose money has been so misapplied, and which is intended to be hereafter so misapplied, is entitled to the interposition of this Court, for the purpose of keeping the company, in the application of his money, to those purposes for which it was said it was to be advanced. That disposes of the principal grounds upon which the demurrer rests.

With respect to the other objections, it appears on the facts that there is no foundation for these objections raised to the bill. It is true this plaintiff is a shareholder and a member of the company, and he is the holder of this particular scrip and a proprietor of this particular stock. He and those who have advanced the money which formed that particular stock, being the holders of scrip by which it is secured, have an interest totally unconnected with the general purposes of the company, and that is the very ground of his equity. He says, "it is true I am a member of the company, but I am also a holder of this scrip, and as a holder of this scrip I have an equity and a right independent of the general purposes for which you (the directors) are carrying on this concern. If I had no scrip I should be merely a member of the company, but having that scrip I filed my bill as proprietor of that scrip." It is entirely clear of all the cases that have been referred to, and it gives that description of persons who are represented by the plaintiff, and the plaintiff himself, a right to say, that the money so raised shall not be applied to any other purposes than those for which it was subscribed.

K. BRUCE, V.C. } *Ex parte* BARRETT.
July 30.

Railway Company—Payment out of Court of small Sums.

A railway company took some land which had been settled on A. for life, with remainder

*to his issue, and the purchase-money was paid into court. An agreement for investing this sum, with the exception of 30*l.* in the purchase of other land, was approved of by the Master. On a petition for carrying out the agreement, it was ordered, that the 30*l.* should be paid to A, he undertaking to lay it out in lasting improvements.*

R. Moore, by his will, bequeathed a leasehold estate, held for a term of ninety-five years, to Mrs. Atkins for life, with remainder to her issue. This estate was taken by a railway company, and the purchase-money was paid into court, and the usual reference was made to the Master to inquire as to the propriety of a proposed agreement for its investment in land.

The Master made his report approving of the agreement, under which the greater part of the money in court would be laid out in the purchase of another leasehold property.

This was a petition praying for a confirmation of the report and consequential directions, and that the residue of the money in court, being about 30*l.*, might be paid to the administrator of Mr. Moore, who was one of the petitioners.

Mr. G. T. White, for the petition, asked that the 30*l.* might be paid to the administrator, he undertaking to lay it out in repairs.

Mr. B. L. Chapman, for the company.

KNIGHT BRUCE, V.C. said that he could not make the order in that form, as the tenant for life was bound to keep the property in a proper state of repair. He had, however, made orders in several cases that small sums under similar circumstances should be paid out to persons entitled to the life estate, they undertaking that such sums should be laid out in *lasting improvements*, and he had no objection to make a similar order in this case.

The order was taken accordingly in this form.

V.C. }
June 4. } BRIGGS v. HARTLEY.

Legacy—Void Bequest as being contrary to Christianity—Bequest void for Uncertainty.

A testator gave a legacy for the best essay on the subject of 'Natural Theology,' treating it as a science, and demonstrating the truth of the evidence upon which it was founded, and the perfect accordance of such evidence with reason, also demonstrating the adequacy and sufficiency of natural theology when so treated as a science to constitute a true, perfect, and philosophical system of universal religion. The testator also gave a legacy for the best essay upon 'Emigration to America':—Held, that the first bequest was void, as being inconsistent with Christianity, and the second bequest was void for uncertainty.

This suit was instituted for the administration of the estate of William Jonas Hartley, and a question was now raised as to the validity of two bequests in the will of Mr. Hartley for prize essays: one upon 'Natural Theology,' and the other on 'Emigration to the United States of North America.' A decree had been made in the cause, directing a reference to the Master to ascertain who were the next-of-kin of the testator. The Master had reported that there were four of such next-of-kin, and it was contended, on their behalf, that the bequests were void.

The testator, by his will, dated the 4th of October 1843, after giving various legacies, gave and bequeathed all his personal estate and effects unto Major-General Briggs, his executors, administrators and assigns, upon trust to convert the same into money, and pay thereout any debts due by the testator, and also his funeral and testamentary expenses, and to apply the residue as a prize or remuneration to be given and awarded by the said Major-General Briggs, according to his discretion and judgment, for the best original essay which he could procure on the subject of natural theology, treating it as a science, and demonstrating the truth, harmony, and infallibility of the evidence on which it is founded, and the perfect accordance of such

evidence with reason; also demonstrating the adequacy and sufficiency of natural theology when so treated and taught as a science to constitute a true, perfect, and philosophical system of universal religion (analogous to other universal systems of science, such as astronomy, &c.) founded on immutable facts and the works of creation, and beautifully adapted to man's reason and nature, and tending, as other sciences do, but in a higher degree, to improve and elevate his nature, and to render him a wise, happy, and exalted being. The testator then gave and bequeathed to the American minister, who, at the time of his decease, might be the accredited minister of the United States Government at the British Court, the sum of 200*l.* sterling, to be paid to him out of his residuary personal estate, upon trust that he should, as soon as conveniently might be after his decease, lay out and apply the said sum as a prize or remuneration to be given and awarded by him, according to his discretion and judgment, for the best original essay which he could procure on the subject of 'Emigration to the United States of North America,' and it would be preferred by the testator that the author of such essay should be some well-informed and respectable American subject holding an official situation under the said United States Government, either in the surveying department or in the public land office department, and thus having access to official reports and documents, and to the most authentic resources of information respecting the public land and territories of the said United States: the chief object of such essay being to diffuse authentic and recent information on the important advantages which those States present, both as a field for general emigration, and especially as a field for British emigration. And the said essay should, therefore, describe and delineate (as fully as might be requisite for general information, and for enabling a just opinion to be formed on the subject) such one or more of the United States, or of the territories included under their government, as should, on the whole, be considered to excel the others, and to be the most advantageous for the aforesaid purposes of emigration, and to be the most eligible and

suitable for such purposes in respect of climate, soil, and of other local advantages and natural resources, as well as in respect of the freedom and justice of civil and political institutions. And in describing such preferable state or territory as should thus, on the whole, be considered both in natural resources as well as politically to excel and surpass the others, and to be the best adapted for emigration and for supporting hereafter a numerous, happy, and civilized population, such essay should specify the grounds on which such preference or superiority was considered to rest, and should quote the authorities in support of such opinion. And the said essay being intended for general circulation needed not to exceed 100 pages octavo : respecting which essay, and also respecting the before-mentioned essay, he had left some further directions and suggestions contained in a separate memorandum of like date with his will, but which memorandum, though here referred to, was to be considered as distinct from his will.

Mr. Bethell and *Mr. Bacon* appeared for two of the next-of-kin, and contended that the bequest of 300*l.* given for the best essay on natural theology ought to be set aside, on the ground of its tendency to demoralize society, and that it would be likely to create ill effects upon the constitution of this country as now established, if such a doctrine were permitted by Her Majesty, through her Attorney General, to be disseminated. It was submitted that the effect would be, if the testator's desire were carried out, to establish a deistical system and a subversion of revealed religion, which would be contrary to the laws of this country and the acknowledged principles upon which the Established Church was founded. As to the second bequest of 200*l.* to the American Minister, for the best essay upon emigration, it was contended that this ought to be set aside, on the ground that it would be the means of inducing persons to emigrate to North America, and ultimately to make themselves subjects of the United States, and by that means throw off their allegiance to their Queen and country.

Mr. Wray appeared for the Attorney General, and contended that the bequest for an essay upon natural theology was

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perfectly allowable, and could not in any way be treated as contrary to law. It would be as absurd to say that the "Bridge-water Treatises," or "Butler's Analogy," or "Dr. Paley's Works," were not in accordance with the law of the land, as to say that an essay, such as the testator contemplated, was likely to injure the morality or religion of the country. Supposing that the testator really intended to give a prize for a work which would promote the doctrine of deism, still that would not be contrary to law, since a great number of writers had for many years supported the same view, and written books upon the subject; but it was contended that such a work as this testator contemplated need not be in any manner inconsistent with revealed religion, but it might only tend to shew the wisdom of God in the creation to be inferred from the works of nature.

Mr. Lloyd, *Mr. Fisher* and *Mr. C. Hall*, appeared for the other next-of-kin.

The American Minister was not represented.

The VICE CHANCELLOR.—I cannot conceive that the bequest in the testator's will is at all consistent with Christianity; and, therefore, it must fail. The second bequest is given in such a way as to be void for uncertainty.

V.C. { *In re* THE DIRECT WEST-END
June 12. { AND CROYDON JUNCTION
RAILWAY COMPANY, *ex*
parte STUDLEY.

Company—Winding-up Act—Provisional Committee-man—Contributory.

Under the Winding-up Act, the name of a gentleman was placed by the Master on the list of contributories who had become a provisional committee-man, upon the understanding that he was not to incur any liability for expenses. No shares were allotted. Motion to reverse the Master's decision refused.

The Direct West-End and Croydon Junction Railway Company was projected in 1845, and a circular was sent to *Mr. Lucas Studley*, requesting him to become one of the provisional committee. In answer to this

request, Mr. Studley sanctioned his name being used as one of the provisional committee, upon the understanding that he should not be held answerable for any expenses or incur any liability. Mr. Studley attended a meeting of the committee, and signed the return required by the Registration Act. No shares were however allotted. It was then agreed that the company were not able to proceed with the undertaking, and Mr. Studley paid the sum of 75*l.* as his share of the debts and liabilities of the company. An order was then obtained, under the recent act of parliament (1), for winding up the affairs of the company, and the Master had placed Mr. Studley's name upon the list of contributories.

Mr. Malins and Mr. Westoby now moved that the decision of the Master should be reversed, and that Mr. Studley's name should be expunged from the list of contributories.

It was contended, that although Mr. Studley had allowed his name to appear as a provisional committee-man, it was upon the express understanding that he should not incur any liability. Mr. Studley had paid what was fair towards the debts incurred, but he objected to his name being placed upon the list of contributories. The proceedings under the act were intended solely to ascertain the rights of the shareholders as between themselves, and had no reference to the claims of creditors, and Mr. Studley had done all that could be required of him. This case was different from the Wolverhampton, Chester and Birkenhead Junction Railway Company (2), as in that case shares had actually been allotted; here they had not; and in that case there was no indemnity against liabilities.

Mr. Bethell and Mr. Rogers, *contra*, were not called upon.

The VICE CHANCELLOR. — From what appears upon the statement of Mr. Studley, it seems to be admitted that he was a member of the provisional committee. I do not see, therefore, that there can be any doubt about the case. My opinion is, that the Master was right, and the motion must be refused.

(1) 11 & 12 Vict. c. 45.

(2) *Ante*, p. 366.

M.R. }
April 15. } HODGSON v. EARL POWIS.

Railway Company—Inability to perform Contract with the Public—Parliamentary Powers—Cesser—Jurisdiction—Judicial Discretion—Injunction.

Upon an application for an injunction, held that a railway company, formed by three acts of parliament, each of which authorized a separate line of railway to be made, and empowered the company to raise a separate sum of money, which was to be considered as part of the general capital, would, after they had made a part of their line of railway, but were unable to complete their contract with the public for making the whole series of lines, be restrained from making calls, or declaring shares forfeited, even though the purpose was for completing that portion of the line which had been made.

Circumstances under which the Court might be induced to exercise a discretion, and allow works to be completed.

This cause now came on upon a motion for an injunction to restrain the Shropshire Union Railways and Canal Company and the directors, from applying any monies in their hands, or which had been paid by the holders of new 20*l.* shares in the company, in respect of the shares held by them, except for the purpose, and with a view to the construction of the whole of the railways and works authorized to be constructed under the powers and provisions of the Shropshire Union Railways and Canal (Shrewsbury to Stafford Railway) Act, 1846, Shropshire Union Railways and Canal (Newtown to Crewe, with branches) Act, 1846, and Shropshire Union Railways and Canal (Chester and Wolverhampton line) Act, 1846, and that the company and directors might be restrained from making any further or other calls upon the new 20*l.* shares in the said company, except for the purpose and with a view to the construction of the whole of such railways and works, and from enforcing the payment of any calls, which had been made upon such new 20*l.* shares under the provisions of the said acts relating to the said company, or any of them, by any action or actions or other proceedings at law against the plaintiff, or any

other holders of new 20*l.* shares in the said company, or from declaring any of such shares to be forfeited for non-payment of such calls.

The plaintiff, after the demurrer was disposed of (1), amended the bill, and added to the exception of those on behalf of whom it was filed, such of the shareholders as were represented by those after named, and it made Hezekiah Hargood, John Cooper and Edward Guy Deane defendants to the suit. It extended the prayer for an injunction, by asking that the company might be restrained from laying out any monies which might thereafter be received by them under the provisions of the several acts of 9 & 10 Vict. c. cccxxiii., 9 & 10 Vict. c. cccxxiv., and 9 & 10 Vict. c. cccxxii., for the purpose only of completing the said railway and works from Shrewsbury to Stafford, or otherwise; and to that part of the prayer that the company might be restrained from enforcing payment of calls by any action or actions, or other proceedings at law, it added, or by forfeiture or otherwise: the rest of the prayer of the bill was struck out. The amendments made to the bill stated the clauses in the several acts of parliament, enacting that the power for the compulsory purchase of land should not be exercised after the expiration of three years from the passing of the respective acts. It also struck out of the statement of the 10 & 11 Vict. c. cxxi. all such parts as referred to the London and North-Western Railway Company; and it stated that divers of the shareholders of 20*l.* had refused to pay the calls made on divers grounds, and particularly on the ground that they had been made, and attempted to be enforced for the purpose of enabling the directors to execute a part only of the works authorized by the said acts, and after the company and the directors had abandoned and lost the power of executing the whole of such works, and it struck out the declaration filed in the Exchequer of Pleas, and the result of the action brought against the plaintiff by the directors. It also stated that the only works done were executed under the 9 & 10 Vict. c. cccxxiii., the Shropshire Union Railways and Canal (Shrewsbury and Stafford Railway) Act,

1846, and consisted of a railway from Shrewsbury to Stafford, of the length of twenty-nine miles or thereabouts; that no portion of the works under the 9 & 10 Vict. c. cccxxiv. and 9 & 10 Vict. c. cccxxii., or of the Stone and Shallowford branches, under the powers and provisions of the Shropshire Union Railways and Canal (Shrewsbury and Stafford Railway) Act, 1846, had been commenced, and that the powers given by the several acts for the purchase of land by compulsion had expired by effluxion of time, without ever having been exercised, so as to enable the several companies to execute the works, or any of them, or any part or parts thereof, and that the company had not purchased or entered into any contracts for the purchase of any lands situate on the intended lines or line of such last-mentioned railways and works, or any part thereof.

That on the 27th of September 1849, the directors, at a meeting then held, expressly stated to the proprietors that they no longer intended to complete the entire undertaking authorized by the said several acts, though any such intention had been disclaimed by the directors up to the date of the report. The plaintiff then struck out all reference to the negotiation with the London and North-Western Railway Company.

The bill then stated that the company, or the directors, had actually received upwards of 900,000*l.* by means of such calls on the holders of such new 20*l.* shares, and that they had a balance in hand of upwards of 5,000*l.*

That the directors were applying, and threatened, and intended to continue to apply the monies in their hands belonging to the said company, and such monies as might come to their hands by means of calls upon the holders of new 20*l.* shares, for the purpose and with a view to the completion only of the railway from Shrewsbury to Stafford, and not with a view to the completion of the entire undertaking of the Shropshire Union Railways and Canal Company, and that they intended to make and enforce the payment of further calls, and to apply the monies arising therefrom for the purpose of completing the construction of the line from Shrewsbury to Stafford only.

(1) *Ante*, p. 356.

That the directors had commenced actions against the plaintiff and others to enforce the payment of calls, or to declare such shares forfeited for the non-payment of such calls.

It also charged that Hezekiah Hargood, John Cooper, and Edward Guy Deane, were respectively holders of new 20*l.* shares in the said company, in respect of which all calls had been fully paid up, but that save as aforesaid the plaintiff was not acquainted with, and had no means of ascertaining the names of the proprietors of new 20*l.* shares, who had paid up all calls on shares held by them, but that they were sufficiently represented by the defendants Hezekiah Hargood, John Cooper, and Edward Guy Deane.

Mr. Roundell Palmer and Mr. Westoby, in support of the motion.—A portion of the line has been opened for traffic; but the defendants say it is expedient to make sidings at an expense of not less than 20,000*l.* The engineer has made no affidavit as to the estimated expense of such works. With respect to existing engagements, the company are not to be restrained from paying them; that was decided at the previous hearing. The railway between Shrewsbury and Stafford has not paid the expenses of working it. The London and North-Western Railway Company have no power to take any part of this line: the transaction would be illegal. The proposed works involve calls on shareholders to the amount of 20,000*l.* and upwards. These works ought to be done out of revenue, and not out of capital. The injunction which the plaintiff asks for, ought, therefore, to be granted.

Mr. Turner and Mr. Willcock, for the directors. — This case is distinguishable from *Cohen v. Wilkinson* (2). The company have three undertakings to carry out, and in doing this they were to convert the Chester and Ellesmere Canal into the railway. The company under each act were to raise a separate sum of money as a general capital, or part of the general capital. The funds, therefore, of one un-

dertaking may be employed, independently of the separate undertakings, towards the expenses of the combined undertakings. The proprietors of the Chester and Ellesmere Canal Navigation, and of other companies, have become subscribers, and the 9 & 10 Vict. c. ccc., directing the line from Shrewsbury to Stafford to be made, expressly mentioned other purposes connected therewith. Assuming, therefore, that the whole of the lines and the capitals are combined, the question is, whether they can apply the funds to complete one part of the line before they have obtained authority to abandon any other, for without authority there is no intention of abandoning any portion of the undertakings. Has, then, the plaintiff any equity to ask the Court to restrain the payment of the call which has been made? It is not alleged by the bill that there are no antecedent liabilities to be answered by that call, or that it may not be required for the purpose of those antecedent liabilities. If the funds are to form one common capital for the performance of the works, no reason exists why a portion of that general capital should not be applied to any part of the general works, with a view to complete the whole. The bill also does not allege that there are not any "other purposes connected therewith," to which this money may be applied.

The railway from Shrewsbury to Stafford, with branches, was a substantive undertaking, distinct in itself. What, therefore, applied to *Cohen v. Wilkinson* does not apply here. The making this line from Shrewsbury to Stafford is not destroying the thing to be constructed, neither is it any abandonment of a part of the thing to be done; it is only completing one of three several things, leaving the company under the obligation to complete the other two, unless parliament should authorize their abandonment. The not proceeding to make the other two lines does not absolve the company from the duty of making them.

The plaintiff, a subscriber to the whole, complains that the company were making one railway with money not subscribed for that purpose; but the money to be raised for this line has not been exceeded, and no shareholder can insist upon having

(2) 1 Hall & Twells, 554; s. c. 1 Mac. & Gor. 481; 18 Law J. Rep. (N.S.) Chanc. 378, 411.

his subscription distributed equally through the whole undertaking. The capital to be raised under the 9 & 10 Vict. c. cccxxiv. and 9 & 10 Vict. c. cccxxii., was declared to be general capital for the purposes of the Shropshire Union Railways and Canal Company, and a part of it was to be applied to pay off the old debts of the Chester and Ellesmere Canal. Under these circumstances the Court will not interfere to prevent the company from raising money to complete that part of the line which has been made so as to render it profitable to the shareholders.

Mr. Speed appeared for the Shropshire Union Railways and Canal Company.

THE MASTER OF THE ROLLS.—Two difficulties are suggested—one that the shareholders are partners, and the other that they have, as a company contracting important obligations to parliament and to the public, been invested with very great and extraordinary powers. In one respect they are to be considered as partners, and subject to all the obligations as partners, but contemporaneous with that they are under obligations of a most important character to the public, and all the Courts are bound to see that they do not exercise their power otherwise than for the benefit of the public, and for the purpose of answering their obligations.

In this particular case the railway company are unable to perform the undertaking which was entered into with parliament: the consequence, therefore, is, that they cease to have all those powers which parliament conferred upon them with a view to the complete performance of the undertaking. As the question has not been strictly decided, I do not know that I have sufficient authority to relax the rule in any case; but what I have done in this, and in *Cohen v. Wilkinson*, shews clearly that I incline to think that I have the power. There is no difficulty in a case where the work has not been begun, or has not been, in any part of it, converted to the public use. The difficulty arises in cases like the present, where the works have been gone on with and constructed to a certain extent, so as to be capable in part, however im-

perfectly, of answering the purpose which parliament had in view when it sanctioned the undertaking; it then becomes material to ascertain whether the company may proceed with a view to render that part more likely to answer the purpose which parliament had in view when it authorized the whole of the undertaking; and at the same time to make it profitable to the shareholders of the company. I do not wish to leave that out of my consideration; the question is, whether in such a case the Court, seeing that the purpose of parliament may be better and more effectually, to a greater extent, accomplished than by leaving it just as it is,—whether the Court may not, seeing that the thing is not strictly legal, nevertheless abstain from interposing its authority to prevent that being done, which would forward the object of parliament, and, at the same time, give a profit to the shareholders to some extent. The inclination of my opinion is, when such a case arises, that it may be done; at least, I am so far of this opinion that if I were now satisfied that I was by this course forwarding the object of parliament, though not completely to the extent originally intended, but to some extent, and, at the same time, doing what would be beneficial to the shareholders, I should not have interfered; but upon reading the affidavits, I am not at all satisfied that by allowing this large expenditure to be made under circumstances in which it appears to me not legal for the parties to incur the expense, I should promote the object which parliament had in view when it granted the powers to the company, or that it would tend to the profit even of the parties themselves. The consequence is, that I must not abstain from exercising that which has now become the proper and necessary rule of the Court. I can make no exception in this case; there has been a mistake made in stating the case, as if I could allow this to be done against the law. It is but in a very indirect sense that I can be said to do so. It comes but to this: that seeing that the thing which is sought to be done is not in accordance with the law, but seeing, nevertheless, that there are circumstances which shew that it would be beneficial to the purpose which parliament had intended,

and also beneficial to the parties to do so, I may abstain from exercising the peculiar jurisdiction of this Court in such a case; it does not make it a bit the more legal; it is only that I withhold my hand, and do not grant an injunction; it is no more, because no abstaining from giving an injunction of this Court can make that legal which is in itself not legal; it is not in the nature of things that it should be so, nor can I exonerate the parties from the consequences, of whatever sort they may be, either at law or in equity. I cannot exonerate them from any liability to which they may be exposed in this respect.

Looking at these affidavits, it comes to this, that the most that can be said is, that they believe that this line of railway, which has been carried to this extent, would be rendered more profitable if this were done. One says that it is not completed to the extent that is necessary, and the other says that it is. That is not a foundation on which I can proceed. I think that I have a right to exercise a discretion in a cause in which it clearly appears to me, as it might have done in this case, that they might have made the railway ready to carry traffic upon it, but that they would not get the traffic without more station accommodation. I can conceive cases of that sort, brought forward with such strong circumstances that I should think it very fair and reasonable to allow that work to be done. I shall, therefore, grant the injunction in the terms of the notice of motion, but not so as to prevent the payment of any debts or liabilities contracted before the date of the notice of motion, or of the current expenses of maintaining and working the line; and if the company have innocently entered into any contracts after the date of the notice of motion, and before they were aware of their situation, they must be at liberty to apply, as the question whether they have incurred any liability must be a circumstance depending on the terms of each particular contract.

See now 13 & 14 Vict. c. 83, passed to facilitate the abandonment of railways.

M.R.	} <i>In re WILLIAMS.</i>
1849.	
Dec. 3.	
1850.	
May 23.	

Solicitor and Client—Undertaking—Responsibility of Solicitor.

A petition was presented by a husband and wife, which related to her separate property; an objection was taken to its being heard on the ground that there was no security for costs: the solicitor of the petitioners instructed counsel to undertake to amend the petition, if required by the Court, by making it the petition of the wife by her next friend. The petition was accordingly heard, and an order made, but the petitioners were ordered to pay the costs. The petitioners and the solicitor afterwards declined to amend the petition, though ordered by the Court so to do; and upon an application that they might do so in four days, or that the solicitor might perform his undertaking,—Held, that the undertaking of the solicitor could only be considered as the undertaking of the client, and that no order could be made against the solicitor personally, but he was refused his costs.

This was a motion that Mr. and Mrs. Nicholson might, in four days, amend a petition which they had presented to the Court, by making it the petition of the wife, by her next friend, or in default thereof that their solicitor might be ordered to perform his undertaking, or pay various costs claimed by the notice of motion.

A petition had been presented by Mr. and Mrs. Nicholson. It was called on for hearing; but an objection was taken by one of several respondents that the petition related to or affected the separate estate of Mrs. Nicholson, and that it ought to have been presented by her through her next friend, and not by her husband and herself jointly. It was objected, on behalf of the petitioners, that the point could not be determined without hearing the petition; and the counsel for the petitioners, being instructed by their solicitor, then present, undertook to amend the petition if required by the Court, and the Registrar made a note to the effect, that the counsel for the petitioners un-

dertook to amend the petition, if required by the Court, by making it the petition of the wife by her next friend; and in consequence of this undertaking the objection was not further pressed. The petition was heard, and an order was made for the delivery up to the petitioners of certain bills of costs, and of certain deeds, papers and writings, and the costs of some of the respondents were ordered to be taxed and paid to them by the petitioner William Nicholson. At the time when the order was made, nothing was said about the undertaking to amend the petition if required, and no order was made in pursuance thereof; but on the attendance before the Registrar to settle the minutes, the petitioners were required to amend the petition pursuant to the undertaking. It was afterwards mentioned to the Court, and an order was made that the petition should be amended by making it the petition of the wife by her next friend; and further it was ordered, that the delivery over of the accounts in the order mentioned by Mr. Weir should be made conditional on his costs being first paid. Various applications were made to the solicitor for the petitioners to amend the petition accordingly, but he had declined to do so; upon which this notice of motion was given.

Mr. Roundell Palmer, in support of the motion.

Mr. Beavan, for the solicitor of the petitioners.—The undertaking was given for the petitioners; the solicitor did not give it for himself or his firm. It was asked that the solicitor should amend, or pay the costs of the petition: this was contrary to the rules of the court. If a solicitor or attorney gave an undertaking, the Courts would enforce it; but in these cases the undertaking given was for the benefit of the client. If, for instance, a solicitor undertook to appear, and did not, the Court would compel him. All undertakings to speed, before the practice was altered, were given for the client, and it was the same with respect to injunctions. In all decrees, it was for the client; the undertaking was the undertaking of the client, and could not be treated as the undertaking of the solicitor. If the Court

did make an order, it ought to be drawn up; and if the undertaking of the solicitor was his, he must obey it, but if it was the clients' undertaking, they must answer it. In this case the petitioners' solicitor incurred no liability; the Court has not decided that there was a misjoinder of the parties presenting the petition, and time must be allowed for them to determine the course they will pursue.

Mr. Roundell Palmer.—The preliminary objection was, that there was no security for costs; the solicitor then instructed counsel to undertake to amend the petition. Could the Court then interpret the undertaking of its officer as the undertaking of the clients? It was the responsibility of the solicitor that was pledged; an undertaking of the clients, guaranteed and backed by the sanction and authority of an officer of the court, that if no other person could be found to take upon himself the responsibility of next friend, he himself would take that responsibility; and if he had no authority from his clients, then it was a trick and fraud upon the Court. The solicitor had a general authority from his clients to act for them; he had filed a bill for the same parties by a next friend in another branch of this court. This was not merely an undertaking on a general authority only; it was also the undertaking of the solicitor on his own authority. In *Cook v. Broomhead* (1) a solicitor was ordered to pay all the costs of his refusing to appear for the defendant at the hearing pursuant to his undertaking, and also the costs of the application—*Evans v. Duncombe* (2).

The MASTER OF THE ROLLS.—The only question which is to be decided on this occasion is, whether the undertaking which the solicitor of the petitioners instructed their counsel to make, is to be considered as the personal undertaking of the solicitor, for which he is personally answerable. There can be no doubt but that the petition was heard on the faith of the undertaking which he caused to be given, and that the failure of the undertaking gives just cause for great disappointment; but I have not been

(1) 16 Ves. 133.

(2) 1 Cr. & J. 372; s. c. 1 Tyrw. 283; 9 Law J. Rep. Exch. 82.

able to find any authority in which it has been held that a solicitor has been required to answer personally for all the consequences proceeding from the failure of such an undertaking as this, given under such circumstances: and having regard to the mode in which, and the circumstances under which it was given, I have come to the conclusion, that it can only be considered as the undertaking of the clients; and, consequently, that no order is to be made on such part of the motion as relates to the solicitor personally. I do not think that the solicitor is entitled to the costs of this motion.

[See *Wigg v. Rook*, 6 Mod. 86, and *Floyd v. Nangle*, 3 Atk. 568.]

V.C. }
May 23. } CARMICHAEL v. OGILBY.

Practice—Claim under the 6th Order of April 1850—Signature of Counsel.

Upon motion for leave to file a claim to take certain partnership accounts alleged to have been irregularly kept, and for an injunction.—Held, that the Orders were not intended to apply to a special case of this nature.

Held also, that such claims did not require the signature of counsel.

This was an application for leave to file a claim under the 6th Order of the 22nd of April 1850. The plaintiff was part owner with the defendants of certain ships, and alleged that the defendants had been guilty of irregularity in the accounts. The object of the claim was, that the accounts might be taken, and that the defendants might be restrained from sending any of the vessels belonging to the partnership upon any new voyage, without first giving the plaintiff security for the value of the shares held by him.

Mr. Foster appeared in support of the application.

The VICE CHANCELLOR.—I have consulted with the Master of the Rolls upon this point arising out of this new species of business, and my opinion is, that this is

not a case in which leave ought to be given to file a claim. The circumstances are very special, and they do not appear to me to be provided for by anything which can be found in the Orders relative to a general case. The plaintiff must, therefore, pursue his right, if he have any, by filing a bill in the usual manner.

With reference to this subject, it has been suggested to me, that it is not necessary that claims under the New Orders should be signed by counsel. I have also consulted Lord Langdale upon this question, and we are both of opinion that the signature of counsel is not requisite. I have spoken upon the same subject to the Vice Chancellor Knight Bruce, who has expressed his opinion that all claims under the 6th Order ought to be signed by counsel. My own opinion, however, is different, and I think that the Court must itself judge as to the expediency of the claim.

V.C. }
June 5. } HODGKINSON v. GILBERT.

Administration Suit—Costs—Liabilities of Trustees.

Trustees who file a bill for the administration of a testator's estate are entitled to their costs, however small the estate may be, and however small the risk in administering the estate.

In this suit, which was filed before the Orders of April 1850, a testator named Gilbert appointed the plaintiffs, who were solicitors, trustees of his will, by which his property was given for the benefit of his eleven children. The plaintiffs proved the will, and instituted this suit for the administration of the estate, which was reported by the Master to consist of 23*l*. personal estate and 15*l*. per annum produced from the real estate, which was encumbered to the amount of 300*l*. The Master also reported that the debts and funeral and testamentary expenses amounted to 30*l*. The case now came on for confirmation of the Master's report.

Mr. Lloyd appeared for the plaintiffs, and asked that their costs might be paid out of the estate in the usual manner.

Mr. Bethell and *Mr. Barber*, for the defendants, contended that this was a suit which ought never to have been instituted. The amount of property was extremely small, and there was no difficulty whatever in the management of it; the debts were very few, and it was the duty of the trustees to have taken upon themselves what little risk there might have been attending the administration of it, and not to have instituted a suit, the costs of which would inevitably amount to the value of the property.

Mr. Lloyd, in reply, said the accusation made against the plaintiffs ought to have been against the forms and machinery of the Court of Chancery. It had been decided, by the Lord Chancellor, in *Knaitchbull v. Fearnhead* (1), that executors and trustees were bound at their own peril to see that all the debts of an estate were paid; and unless they availed themselves of the Court of Chancery in passing their accounts, they would be liable at any future time for unpaid debts, of which they might have been wholly ignorant. However small, therefore, the estate might be, they were not justified in distributing the assets without having the security of the forms allowed by the Court. It was expressly to obviate this difficulty and to save small estates being eaten up with costs, that the New Orders had been made, which rendered such applications to the Court far less expensive.

Mr. Bethell, in reply, contended that the case cited could not be considered as an authority for enabling trustees to incur the expense of coming to the Court of Chancery in cases where the property was so small and the risk so trifling.

THE VICE CHANCELLOR.—This case can only be determined by the general rule to be acted upon in such matters. I do not understand that anything has been done by the plaintiffs which is not in accordance with the course of duty pointed out by the rules of law. It is true that cases of great hardship may arise; but unless I can find that the plaintiffs have infringed any of the rules of the court I cannot interfere to prevent them from having their costs. It

is alleged by the bill that difficulties have arisen with regard to the administration of the estate; I cannot tell what those difficulties may be, but I do not think sufficient has been stated to justify the Court in directing the costs to be paid otherwise than in the usual manner.

M.R.	}	
1849.		
Nov. 14, 16, 19, 20,		BLENKINSOPP v.
21, 22, 23, and 24.		BLENKINSOPP.
1850.		
Feb. 9.		

Voluntary Deed—Fraud—Creditors—Suit to enforce Proceedings before Privy Council—Jurisdiction—Statutes.

Pending proceedings before the Judicial Committee of the Privy Council, upon an appeal from the ecclesiastical courts in a suit by H. B. against her husband G. T. L. B. for a divorce for cruelty and adultery, the defendant G. T. L. B. executed a deed conveying all his real and personal estates and effects to trustees, upon trust for the benefit of creditors, and for other purposes: various monitions were made against G. T. L. B. for the payment of costs, and for the payment of the alimony of his wife, but none of them were obeyed. During the progress of the proceedings various acts of parliament were passed, and those in force at the commencement were either repealed or extensively varied at the termination of the proceedings before the Judicial Committee of the Privy Council; that Court issued a sequestration under the statutes then in force. Upon the sequestrators going down they were informed that the property was no longer vested in the defendant, but in F. and T. as trustees, and that they refused to give possession to the sequestrators. A return to that effect was made to the Judicial Committee of the Privy Council; another sequestration was issued, but no attempt was made to enforce it. Upon a bill by the plaintiff in this court asking that the deed might be declared fraudulent and void, and to have full benefit of all the proceedings before the Judicial Committee of the Privy Council, and if it was not void asking that the beneficial interest of G. T. L. B. might be made liable to the several

(1) 3 Myl. & Cr. 122.

sums of money due for costs and alimony,—Held, that under the last statute the Surrogates had authority to issue a sequestration to compel obedience to all the orders of the Judicial Committee of the Privy Council; that under the writs of sequestration issued the Commissioners were authorized to take possession of the real and personal estates of G. T. L. B.; that powers given to the Judicial Committee of the Privy Council to direct issues, &c. make inquiries, &c. do not extend to cases like the present; and though the deed was executed before any right declared, yet as it was to defeat a right which the plaintiff was entitled to establish, it was considered as executed to defraud the plaintiff, and ought not to prevail, and that the deed was fraudulent and void, except as to creditors bonâ fide, whose debts were provided for; and that the plaintiff was entitled to payment of the sums of money directed by the proceedings in the Judicial Committee of the Privy Council, with costs, but that she was entitled to no relief against the creditors, against whom the bill was dismissed, with costs, to be paid by the plaintiff and recovered over against the defendant G. T. L. B.

Held, also, that letters of the defendant written to his solicitors before the deed was executed were admissible in evidence; but, quære, whether letters written after the deed can be received as evidence of fraud in the execution.

This bill was filed by Harriot Leaton Blenkinsopp, by her next friend, against George Thomas Leaton Blenkinsopp, her husband, and against Thomas William Fenwick and William Trotter, and divers other persons, who were specialty and simple contract creditors of her husband, and against William Blenkinsopp Leaton, Richard George Leaton Blenkinsopp, Edwin Clennell Leaton Blenkinsopp, and Anthony Leaton Blenkinsopp, when he shall come within the jurisdiction of this court.

In March 1841, the plaintiff, Harriot Blenkinsopp, instituted a suit in the Consistorial Court of Durham, against her husband, the defendant George Thomas Leaton Blenkinsopp, for a divorce by reason of cruelty and adultery; the libel was objected to, but it was admitted; upon

which the defendant appealed to the Chancery Court of York.

On the 29th of November 1841 that Court confirmed the sentence of the Consistorial Court of Durham, and retained the principal cause, and admitted the libel, but ordered the same to be reformed in two of its articles, which was done.

From this decree the defendant appealed to the Judicial Committee of the Privy Council, and it was heard on the 13th of July 1842, when the Committee agreed to report to Her Majesty that the principal cause should be brought into that court, and that the libel should be further reformed, and that the defendant should be condemned in the costs incurred in the court below.

On the 11th of August 1842 the report was confirmed by Her Majesty in Council, and the appeal proceeded.

The bill of costs payable by Mr. Blenkinsopp, was brought in and taxed by one of the Surrogates at 270*l.* 13*s.* 7*d.*, and on the 22nd of April 1843 he was ordered to pay them.

On the same 22nd of April 1843 a sum of 160*l.* per annum was allotted to the plaintiff for alimony during the dependence of the suit, to commence from the term of the citation in the Consistorial Court of Durham.

On the 9th of May 1843 the defendant was ordered to pay to the plaintiff 320*l.*, being the amount of two years alimony from the 12th of March 1841, the day of the return of the citation in the Consistory Court of Durham, to the 12th of March 1843.

On the 7th of December 1843 Mr. Blenkinsopp was pronounced to be contumacious and in contempt.

On the 15th of December 1843 the cause was heard before the Judicial Committee, and they reported to Her Majesty that the plaintiff ought to be divorced from her husband by reason of the adultery by him committed, and he was condemned in the costs incurred subsequently to those taxed, and he was directed to pay to the plaintiff a permanent alimony of 300*l.* per annum, to commence from the date of the confirmation of their report.

On the same 15th of December 1843 the Judicial Committee also ordered, that the defendant should pay to the plaintiff 120*l.*

the amount of three quarters further alimony, from the 12th of March to the 12th of December 1843, at the rate of 160*l.* per annum, allotted to her during the dependence of the suit.

On the 31st of January 1844 Her Majesty confirmed the report made to her.

The subsequent costs were taxed by the Surrogate at 282*l.* 13*s.* 9*d.*, and on the 29th of April 1844 the defendant was ordered to pay them.

On the 8th of November 1844 the Surrogate ordered the defendant to pay to the plaintiff 225*l.* the amount of permanent alimony, at the rate of 300*l.* per annum, due from the 31st of January 1844, the date of the confirmation of the report of the Judicial Committee to the 31st of October 1844.

In every case where payment of costs or alimony was ordered, a monition for payment was issued and served, but none of them were obeyed.

On the 13th of December 1844 Mr. Blenkinsopp was pronounced contumacious and in contempt, and a sequestration was decreed and issued against his real and personal estate, to obtain payment of the several sums of 270*l.* 13*s.* 7*d.*, 320*l.*, 120*l.*, 282*l.* 13*s.* 9*d.*, and 225*l.*, which he had neglected to pay in pursuance of the orders.

The sequestrators proceeded to Hoppylands Park and the other estates of Mr. Blenkinsopp, and were informed that they were no longer his property, and from what they ascertained they certified that Mr. Blenkinsopp, by an indenture dated the 2nd of September 1842, had conveyed and assigned all his real and personal estates to Messrs. Fenwick and Trotter, their heirs, executors, administrators and assigns, as trustees, and that they were in possession and receipt of the rents, and, notwithstanding that a notice had been served upon them, they refused to let the sequestrators into possession, and they made a return that Mr. Blenkinsopp, at the time of the execution of the writ, had no real or personal estates, except those included in the said indenture.

The indenture of the 2nd of September 1842 was made between G. T. L. Blenkinsopp of the one part, and T. W. Fenwick and W. Trotter of the other part, and after reciting that G. T. L. Blenkinsopp

was then entitled to considerable real and personal estates in the counties of Northumberland and Durham, and in the borough and county of Newcastle-upon-Tyne, and reciting that the customary tenements to which the said G. T. L. Blenkinsopp was entitled, consisted of messuages, &c. held of the several manors of Hexham in the county of Northumberland, and of Whickham and Lanchester in the county of Durham; and reciting that the fee simple and customary tenements thereinbefore referred to, or certain parts thereof, respectively, were then charged with the payment of the several sums of money thereafter stated (that is to say), the tenements in the several parishes of Chalton and Doddington with the payment of the principal sum of 3,000*l.*, the unpaid residue of the sum of 4,000*l.* theretofore charged thereon in favour of Christopher Smith, John William Rhodes, and William Smith, and the interest thenceforth to become due in respect of the said principal sum; the tenements in the parishes of Jarrow and Bolden with the payment of the principal sum of ——— *l.*, (which was left blank in the deed), and interest; and a tenement in the manor of Hexham called Woodside, otherwise Hackford, with the payment of the principal sum of 2,700*l.* and interest; and the hereditaments within the borough of Newcastle-upon-Tyne with the principal sum of 600*l.* and interest; and after reciting that the said G. T. L. Blenkinsopp was indebted to various persons on bond and simple contract in several sums of money, amounting in the whole to ———, (which was left blank in the deed) or thereabouts; and further reciting that the said G. T. L. Blenkinsopp was desirous to make, among other things, a provision for the payment of the interest of the said debts on mortgage and bond, and also to provide a fund for the payment of the principal of the said debts on bond and simple contract; it was witnessed that the said G. T. L. Blenkinsopp did release so much and such part of the messuages, &c. described in the first, second, and third schedules thereto as were of freehold tenure, to hold the same, subject to the various incumbrances to which the same respectively were liable, unto and to the use of the said T. W. Fenwick and W. Trotter, their

heirs and assigns; and he covenanted with the said T. W. Fenwick and W. Trotter, and their heirs sequels in right, and assigns, within the space of one calendar month next ensuing the date of the deed, to surrender to the use of T. W. Fenwick and W. Trotter, and their heirs sequels in right, and assigns, or as they might direct, free from all incumbrances, except the subsisting trusts of the settlement made upon the marriage of G. T. L. Blenkinsopp with Harriot his wife, which affected the tenements held of the manor of Whickham. And it was further witnessed that the said G. T. L. Blenkinsopp did assign unto the said T. W. Fenwick and W. Trotter such arrears of rent and other sums of money as were then due to him from any of the tenants or occupiers of any of the freehold hereditaments or of the customary tenements thereby covenanted to be surrendered, and also all monies in the hands of G. T. L. Blenkinsopp, or due to him from any receiver or agent of his estates, and all securities for the same, and also all monies and all debts due to him, and also all the household furniture, plate, &c. and all personal chattels specified in the fourth schedule, and also all other his personal estate and effects, except the wearing apparel, and all interest then due and thenceforth to grow due in respect of the arrears of rents, principal monies, debts, and other things or actions, and all remedies for recovering payment, to hold the same unto the said T. W. Fenwick and W. Trotter, their executors, administrators and assigns, upon trust, as to the freehold and customary tenements to pay out of the rents and profits thereof respectively all taxes, and in the next place to repair and keep in repair all the buildings on the said trust estates, and insure such buildings against destruction and damage by fire, and keep on foot the policies on such insurance, and from time to time to let the same trust premises, including the mansion-house and Hoppylands Park furnished, or any part thereof, at rack-rent for any term of years in possession, not exceeding ten, and also properly to thin and fence all the woods and plantations, and for that purpose to employ competent woodmen and allow them such wages as they might think proper, with full power

to revoke and renew such employment, as they might see occasion. And as to the personal chattels, to sell the same, except the household furniture in Hoppylands Park house, and to recover the money arising from such sale; and as to things in action, to call in, receive, and convert the same into money; and to stand possessed of the money so to arise, and also of the rents and profits and other periodical proceeds of such real estate, and also of the interest of so much of the money and debts as bore interest until the same should be gathered in, and of all other the money which might come to their hands by virtue of the deed, upon trust, to reimburse themselves the expenses, including those of preparing and executing the deed and any counterpart thereof, and of contesting the payment of any debt described in the schedule thereto, or of any other simple contract debt due to or claimed from G. T. L. Blenkinsopp, or of defending the possession or asserting their right to the freehold and customary tenements, or otherwise attending the execution of the trusts thereby created, which they or either of them might incur or sustain in carrying the trusts into execution; and in the next place to retain and divide between themselves the yearly sum of 100*l.* a-year, as a compensation for their trouble in the execution of the trusts, and subject thereto to pay the money then due on account of servants' and labourers' wages, not exceeding 50*l.*; and after payment thereof then to discharge the arrears and growing payments of the interest of the several principal sums of money specifically charged upon the freeholds and customary tenements, and after the payment thereof from time to time to pay and satisfy the arrears and growing payments of bond and simple contract debts stated in the fifth schedule on such of the debts as bore interest; and after making such several payments, to raise and pay the several yearly sums of money thereafter stated to the several persons thereafter named for the periods therein-after stated, that is to say, to William Blenkinsopp Leaton, the only brother of the defendant, G. T. L. Blenkinsopp, during his life the annuity of 200*l.* a-year, being the annuity charged upon the estates in the parishes of Chalton and Doddington

by Elizabeth Carrighan; to the said defendant, G. T. L. Blenkinsopp himself, the yearly sum of 150*l.* during his life: to such one or more of his three sons, Richard G. L. Blenkinsopp, Anthony L. Blenkinsopp, and Edwin C. L. Blenkinsopp, as the defendant, G. T. L. Blenkinsopp, might from time to time appoint by any writing signed by him with his name, the clear yearly sum of 450*l.* during the joint lives of him, the said G. T. L. Blenkinsopp, and of his said sons, and the survivor and survivors of them, or such less yearly sum as the said G. T. L. Blenkinsopp might from time to time direct by some writing signed by him with his name; and lastly pay the yearly sum of not exceeding 100*l.* to his wife, Harriot Blenkinsopp, if and after she should have withdrawn certain proceedings then pending in the Consistory Court of the Bishop of Durham, or Her Majesty's Privy Council, or any other ecclesiastical court, against the said defendant and did not again institute such proceedings. And it was thereby declared that the several yearly sums thereinbefore stated should be paid to the several persons entitled thereto respectively, free from land-tax and all other deductions, by equal portions, on the 12th of May and the 22nd of November next ensuing the day of the date of the conveyance and assignment; and after making and providing for the several payments aforesaid, to pay and discharge the said bonds, notes, and simple contract debts mentioned in the fifth schedule thereto, at such times and in such proportions as they should in their discretion think proper; and after payment thereof from time to time to invest the surplus of such rents and profits and interest and dividends, in their own names, in the Parliamentary stocks or funds of Great Britain, except determinable annuities, or at interest upon government or real securities within England, and not in Ireland (4 & 5 Will. 4. c. 29.), to be from time to time altered or varied as occasion might require, and also to receive not only the interest and dividends of such trust-monies, stocks, funds, and securities, but also the interest and dividends of the investments to be made in pursuance of the present clause, so that

such rents and profits and interest and dividends might accumulate in the way of compound interest. And it was thereby further declared that T. W. Fenwick and W. Trotter might, from time to time, call in and convert the said accumulating fund into money, and apply the same in satisfaction or liquidation, as the circumstances of the case might require, of any principal sum which might then affect the hereditaments thereby assured, or agreed so to be, or any of them, or any part thereof respectively, together with the interest thereof, whether such accumulated funds had proceeded from the rents and profits of the hereditaments so incumbered or not. It was also provided that if, during the continuance of the trusts thereby created, the clear yearly rent and profits of the freehold and customary tenements thereby assured or agreed so to be increased to the extent of _____, the said T. W. Fenwick and W. Trotter might, but need not, pay such yearly sum to the said G. T. L. Blenkinsopp, in addition to the yearly sum of 150*l.* thereby provided for him, as they might think proper, not exceeding one fourth part of the amount of such increase. It was also provided that T. W. Fenwick and W. Trotter might at any time charge all or any part of the aforesaid trust tenements with the payment of any gross sum of money, not exceeding 2,000*l.*, for such purpose as the said defendant, G. T. L. Blenkinsopp, might think proper and direct. It was also provided, that all trust monies which might be received by Messrs. Fenwick and Trotter should, as and when the same should amount to the sum of 50*l.*, be paid into the hands of the Newcastle and Sunderland Union Joint-Stock Banking Company, or any branch thereof, in their own names, there to remain until the same should be applied to the execution of the trusts.

The bill then stated that the defendant, G. T. L. Blenkinsopp, both prior and subsequent to the decision of the Judicial Committee of the 13th of July 1842, expressed a determination to deprive the plaintiff of all benefit of the proceedings instituted against him; and that Messrs. Fenwick & Trotter, his solicitors, after various communications, agreed to assist him, and

finally that the deed of the 2nd of September 1842 was executed; upon which Messrs. Fenwick & Trotter entered into possession of the estates, and communicated the effect of the deed to the specialty and simple contract creditors of Mr. Blenkinsopp, and that they asserted and claimed an interest under the deed.

Mr. Blenkinsopp, after executing the deed, went to reside in Scotland, within the precincts of the Palace of Holyrood, and though an attachment was issued against him for non-obedience of the monitions of the Judicial Committee it could not be executed within the precincts of the Palace.

On the 5th of July 1845, in pursuance of an order of the Judicial Committee of the Privy Council, a further writ of sequestration was issued. The bill then charged that the estates were very valuable; that the specialty and simple contract debts were not of large amount; that Mr. Blenkinsopp was not embarrassed or in any manner compelled to execute the deed, but that it was executed without the knowledge of any of the creditors named; that the defendant, G. T. L. Blenkinsopp had executed the power reserved to him by the deed in favour of his sons Richard G. L. Blenkinsopp, Anthony L. Blenkinsopp, and Edwin C. L. Blenkinsopp, and that they had a beneficial interest under it; that Messrs. Fenwick and Trotter had received and paid some large sums of money in pursuance of the provisions of the deed, and that they still had considerable sums in hand; that the deed of the 2nd of September 1842 was fraudulently contrived to delay, hinder and defraud the plaintiff of her just rights, and to defeat the orders and decrees of the Consistory Court of Durham, the Chancery Court of York, and the Judicial Committee of the Privy Council, and all other proceedings and process of law to enforce the payment of alimony and the costs of suit.

The bill then prayed, that it might be declared that the deed of the 2nd of September 1842 was fraudulent and void as against the plaintiff, and that it might be delivered up to be cancelled; that the plaintiff might have in equity the full

benefit and advantage of the several monitions, orders and sequestrations, and that out of the messuages, lands, and hereditaments, real and personal estate, goods, chattels and effects, comprised in the said indenture of the 2nd of September 1842, the several sums claimed, and also the plaintiff's alimony which had since accrued due, might be paid and satisfied, and that all proper accounts might be directed and inquiries made respecting the real and personal estate of the defendant G. T. L. Blenkinsopp, and that Messrs. Fenwick and Trotter might be restrained by injunction from receiving the rents or getting in or intermeddling with the personal estate, or dealing with the legal estate or hereditaments. It also prayed for a receiver; and in case the Court should not think fit to declare the deed fraudulent and void, the bill then prayed that the beneficial interest of Mr. Blenkinsopp under the deed might be declared to be liable to pay the several sums of money, and also the alimony to the plaintiff, together with the costs of the suit, and that the defendant might be restrained from making any further appointment under the powers reserved to him by the indenture, and that Messrs. Fenwick and Trotter might be restrained from making any payments out of the monies received by them by virtue of the deed.

The defendant, G. T. L. Blenkinsopp, by his answer, admitted the proceedings in the ecclesiastical court against him, and said that for want of funds he had not obeyed the monitions: he also admitted the execution of the deed of the 2nd of September 1842, but said it was for the benefit of creditors, and to avoid proceedings against him, and was not executed to defeat or delay the plaintiff or to defeat the orders and decrees of the ecclesiastical courts or the Judicial Committee of the Privy Council, or the proceedings to enforce the payment of the plaintiff's alimony, he having by the deed provided an allowance for his wife in proportion with his own, if she chose to accept it, and that it was not to defeat the payment of the costs of the suit; that none of the orders of the Privy Council or the Surrogates thereof were pronounced or made at the time the deed was executed, and he

submitted to this Court whether the several acts of court, monitions and orders, or the process of sequestration were in force, and whether by reason of the trust deed they could be made available.

Messrs. Fenwick and Trotter, by their answer, said that the defendant G. T. L. Blenkinsopp was in embarrassed circumstances, and that in 1841 and 1842 he contemplated the conveyance of his estates for the benefit of his creditors; that the deed, with the exception of providing for payment of his debts, was voluntary, but not fraudulent, or fraudulently contrived for the purposes alleged in the bill, and that they took the trust considering the instrument *bond fide*; that at the time of executing the deed, G. T. L. Blenkinsopp did not contemplate any sequestration being issued; that the deed was not executed to avoid process, and that he did not go to Scotland to deprive the plaintiff of her rights, but to protect his person. They also admitted that G. T. L. Blenkinsopp had in January 1843 made some small appointments in favour of his sons Edwin and Anthony, and they claimed to be allowed all payments properly made by them under the deed, and they submitted to the Court whether the plaintiff was without remedy unless the Court interposed. They also denied that a letter had been written to them by the plaintiff, in which the facts stated and charged in the bill had been admitted, or that they had any letter except those stated in the third schedule, and which they declined to produce in consequence of their being privileged, though G. T. L. Blenkinsopp by his answer denied that they had any papers, &c. as his attornies.

The several other defendants put in answers generally denying that they were immediately served with copies of the deed of the 2nd of September 1842.

The evidence principally consisted of a great number of letters written by Mr. Blenkinsopp to Mr. Trotter, some before and others after the execution of the deed of the 2nd of September 1842. It was objected that these ought not to be read; but subsequently they were read, and the question of their admissibility reserved: the

facts relating to which are fully stated in the judgment.

Mr. Turner and Mr. Glasse, for the plaintiff.—The settlor could not consider that the deed limited him to 150*l.* per annum. The case shewed a deliberate fraudulent intention to defeat his wife's rights. As early as 1841, the defendant in his letter to Mr. Trotter, stated he was willing to submit to any sacrifice. It was true that there was no actual order then made for the payment of alimony; but it is impossible to look at the deed and not see that it was framed for the express purpose of defeating process. The fraud was concocted between these parties to defeat sequestration, but it was not defeated by a voluntary conveyance *pendente lite*—*Wittham v. Bland* (1), *Coulston v. Gardiner* (2). No pressure from creditors was either suggested or pretended; but even assuming that notice was given to the creditors, could they claim any title under a fraudulent deed? Their interests were obtained through the fraud of another person, and could not be maintained—*Huguenin v. Baseley* (3). If Mrs. Blenkinsopp had been content with the provisions of the deed, would there have been any communication made to the creditors? This case is stronger than *Wallwyn v. Coutts* (4), and *Garrard v. Lord Lauderdale* (5). The Court will, therefore, either order the deed to be set aside altogether, or make a decree for payment of 300*l.* a-year alimony, since the execution of the process of the Privy Council has been defeated by the act of the defendant, and process issued out of this court gives clear relief against the party in possession. The Privy Council has no power to give relief, but it is common for a court of equity to assist the other courts, and for that purpose to remove obstructions. The Privy Council is entitled to the assistance of this Court, and it is also to be considered that the

(1) 3 Swanst. 276, n., where all the cases are collected.

(2) Ibid. 279, n.

(3) 14 Ves. 273.

(4) 3 Sim. 15; a. c. 3 Mer. 707.

(5) 3 Sim. 1.

impediment was fraudulent — *Taylor v. Wyld* (6). As to the admissibility of the letters, they were obtained under the charge in the bill, and were evidence of the fraud.

1 *Fonbl. Treat. Eq.* 10.

Lord Derby v. the Duke of Atholl, 1 Ves. sen. 203.

Neate v. the Duke of Marlborough, 3 M. & Cr. 407; s. c. 9 Sim. 60.

3 & 4 Will. 4. c. 41.

Malcolm v. Scott, 3 Hare, 39; s. c. 14 Law J. Rep. (N.S.) Chanc. 57.

Mr. Roupell and Mr. Dickinson, for G. T. L. Blenkinsopp. — It is first necessary to consider whether the Court has any jurisdiction to interfere, the Privy Council being a court of competent jurisdiction. *Taylor v. Wyld* is the first case in which the statutory powers of the Court came in question. But will this Court entertain a suit for an execution against property pending proceedings? The statutes relating to the Privy Council are the 2 & 3 Will. 4. c. 92, (1832,) and 2 & 3 Will. 4. c. 93, and section 2. directs that where persons are contumacious, the Lord Chancellor shall cause process of sequestration to issue against the estate of the party in England. Further, therefore, it is not a general writ. The 3 & 4 Will. 4. c. 41, (1833,) sections 10, 15, 28, empowered the Privy Council to direct issues and placed the costs at their discretion, and it authorized the appointment of a Registrar. The 6 & 7 Vict. c. 38. (1843,) section 8. was passed for the purpose of giving increased powers to the Judicial Committee of the Privy Council; and section 6. repeals all that part of 2 & 3 Will. 4. c. 93. which gives the Privy Council power of punishing contempts; it also by section 13. repeals 3 & 4 Will. 4. c. 41. s. 28. The 7 & 8 Vict. c. 69, (1844,) section 12, gives power to the Privy Council to follow up the writ of sequestration, but gives to the party no more than the Privy Council might give him, an order for payment. The Court of Chancery, in a suit of its own, can set aside such a deed as this without a bill,

and the same power is vested in the Privy Council. There was no attempt to execute the second writ, but the present claim is now made to rest upon that writ. It was alleged upon the pleadings "that the property was put out of the reach of the writ," and the plaintiff insists that the Privy Council is not the Court to apply to; but that she has a right to resort to a court of equity. There is a great difference between execution and sequestration: by the first, the party acquires a lien: a sequestration is infinitely higher, it is the power of the Court, and not the power of the party, or a remedy given to the party, but it is a power given to the officers of the court for a contempt which may ultimately work for the benefit of the party. The money raised does not go to the plaintiff, but to the Court. Mrs. Blenkinsopp had no means of obtaining payment under the writ of sequestration. She could only resort to the Privy Council for a further order; but the bill seeks payment without that, notwithstanding the suit is there pending. If any application was made to the Privy Council pending these proceedings, there might be a conflict in the jurisdiction. It was open for the sequestrators to apply for assistance — *Johnson v. Chippendall* (7), *Empringham v. Short* (8). There is no sufficient evidence of the fraudulent intention of Mr. Blenkinsopp, and the letters subsequent to the deed are inadmissible as evidence of intention. They ought to be contemporaneous, and distinctly refer to the intention with which the deed was executed — 1 *Ph. Ev.* 198, 199, where the cases are stated, *Rawson v. Haigh* (9); and letters by third persons can afford no evidence of the intention of the party. When the deed was executed, the Privy Council was not in a situation to issue a sequestration; the only remedy, therefore, was personal. It consequently could not be said that the deed was executed to defeat the sequestration, the order of the 13th of July 1842 being the only existing order. The Court only affords assistance to a creditor at law

(7) 2 Sim. 55.

(8) 3 Hare, 461; s. c. 13 Law J. Rep. (N.S.) Chanc. 301.

(9) 2 Bing. 99; s. c. 2 Law J. Rep. C.P. 130.

(6) 8 Beav. 159.

having an execution—*Angell v. Draper* (10), *Neate v. Duke of Marlborough*. In *Skeeles v. Shearly* (11) it was held that the Court of Chancery had no authority to assist a judgment creditor against a power executed. But, in order to obtain payment of arrears of alimony, it would grant the writ of *ne exeat regno*—*Vandergucht v. De Blaquiére* (12), *Shaftoe v. Shaftoe* (13), *Dawson v. Dawson* (14), *Haffey v. Haffey* (15); but then it must be for permanent alimony—*Street v. Street* (16). As the demand was personal against the defendant, and did not affect the title to the lands even if the sequestration had issued in a suit in Chancery, the title could not accrue before the issue of the writ—*Crofts v. Oldfield* (17). When the deed was executed the plaintiff had no claim upon the estate, and no fraud could be committed against her by conveying the estate to trustees; it did confer a benefit upon the creditors, who availed themselves of it: it also provided an allowance for G. T. L. Blenkinsopp. The case, therefore, differed from *Taylor v. Wyld*. As no fraud had been committed, the bill ought to be dismissed, notwithstanding there was the prayer for alternative relief—*Glascott v. Lang* (18), *Wilde v. Gibson* (19); and with respect to the alternative prayer, the plaintiff not being a creditor having rights against the real estate of the defendant, there is no ground for the interference of the Court.

Mr. Walpole and *Mr. Faber*, for Messrs. Fenwick and Trotter.

Mr. Lloyd, *Mr. Willcock*, *Mr. Borton*, *Mr. Ellis*, *Mr. Bayley* and *Mr. Simpson*, appeared for various creditors and other parties interested under the deed.

Mr. Turner, in reply.—The power to sequester granted by the 2 & 3 Will. 4.

(10) 1 Vern. 399.

(11) 8 Sim. 153; s. c. 3 Myl. & Cr. 112; 4 Law J. Rep. (n.s.) Chanc. 5.

(12) Ibid. 315; s. c. 5 Myl. & Cr. 229; 7 Law J. Rep. (n.s.) Chanc. 270.

(13) 7 Ves. 171.

(14) Ibid. 173.

(15) 14 Ibid. 261.

(16) Turn. & R. 322.

(17) 3 Swanst. 278, 279.

(18) 2 Phil. 310; s. c. 16 Law J. Rep. (n.s.) Chanc. 429.

(19) 1 House of Lords Cases, 605.

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c. 93. ss. 1, 2, 4, was extended to the Privy Council by the 3 & 4 Will. 4. c. 41. s. 28, and this act was in full force at the date of the deed. It is unnecessary to examine the subsequent acts; the 7 & 8 Vict. c. 69. empowered the Privy Council to issue sequestration generally against all persons, whether within the dominions or not. But suppose the Privy Council had power to enforce its own order, that did not vary the common law or repeal the 16 Car. 1. c. 10. s. 5, and take away the power of the King in Council over lands. The 3 & 4 Will. 4. c. 41. s. 28. might empower the Privy Council to issue process, and leave it to be enforced by the other Courts. In this case it is necessary to enforce the purpose of the sequestration by bill, as the powers of the Privy Council cannot be extended to all cases in which the sequestrators may be met by persons claiming title. The cases relating to the *ne exeat regno* are not applicable; it applied to an equitable debt only of ascertained amount, but the Court will always assist in cases relating to permanent alimony, and it will set aside a deed executed to defeat a creditor having an inchoate right, the same as if it actually existed. It is not necessary to establish a lien to obtain the interference of this Court in aid of the process of another. It is sufficient if you go as far as you can, in the case of judgment to an *elegit*, and in the case before the Privy Council to a sequestration—*The Attorney General v. Rickards* (20). With respect to the letters, a subsequent admission of the motive with which they were written by the party executing the deed would, if direct, be evidence, and so would be a constructive admission. The defendant, at the utmost, can only ask for inquiry—*M'Mahon v. Burchell* (21), *Whitley v. Martin* (22), *Cadogan v. Kennett* (23), *Pickstock v. Lyster* (24), *Hamblyn v. Ley* (25). To support the deed under the 13 Eliz. c. 5, there must be a valuable consideration *bond fide*, and it must be shewn that the parties

(20) 6 Beav. 444; s. c. 12 Cl. & F. 30; 14 Law J. Rep. (n.s.) Chanc. 363.

(21) 2 Phil. 127.

(22) 3 Beav. 226.

(23) Cowp. 432.

(24) 3 M. & S. 871.

(25) 3 Swanst. 301.

claiming under it had no notice. If, therefore, the deed is not set aside altogether, still the plaintiff is entitled to a preference over all the trusts, except those for the benefit of creditors, and to have an account against the trustees, with a direction to allow *bond fide* payments made by them to creditors.

Feb. 9.—The MASTER OF THE ROLLS.—After the execution of the deed Messrs. Fenwick and Trotter entered into possession, and the defendant went to reside in Scotland, and sought protection from the process issued against him, by residing within the precincts of Holyrood House. The evidence of the intention imputed to Mr. Blenkinsopp is principally found in letters written by him to Messrs. Fenwick and Trotter in relation to the suit in the ecclesiastical court, and a question was made, whether those letters or any of them were properly admissible in evidence. The bill alleges that Mr. Blenkinsopp applied to Messrs. Fenwick and Trotter for advice and assistance; that various communications took place between him and them, and that they agreed to assist him in the matter, and various schemes were proposed and discussed by letter and word of mouth; that the defendants had in their possession letters and papers, whereby the truth of the matters in the bill alleged would appear; and that Messrs. Fenwick and Trotter refused to produce the papers in their hands, on the ground that they had them only as trustees. Mr. Blenkinsopp, by his first answer, denies that Messrs. Fenwick and Trotter had in their possession any letters, otherwise than as his solicitors, and in the answer of Messrs. Fenwick and Trotter it is stated that Mr. Trotter was a practising solicitor, and had been employed by Mr. Blenkinsopp as his solicitor in matters of business relating to his property, and when the ecclesiastical suit was commenced Mr. Blenkinsopp consulted Mr. Trotter as to the course to be adopted, and he advised the appointment of a proctor, and so far as any solicitor was employed he was the solicitor. They admitted that they had in their hands certain papers relating, as they say, more or less to the matters in question; but they profess to hold them merely as trustees.

Among the papers thus admitted to be in their possession were three bundles, numbered 1, 2 and 3, and Mr. Blenkinsopp in a subsequent answer admitted that the documents comprised in those bundles all came to the possession of Mr. Trotter as the solicitor of Mr. Blenkinsopp, which consisted of letters written by him to Mr. Trotter as his solicitor. Those letters, after considerable resistance, were ultimately produced under the order of the Court (26), and are now tendered in evidence. Some of them are dated before, and others after the date of the deed of the 2nd of September 1842, and it is contended that none of them, but particularly none that were written after the date of the deed, ought to be read in evidence. Under the circumstances of the case, it is impossible that either Mr. Blenkinsopp or Mr. Trotter as his solicitor and one of his trustees, or Mr. Fenwick the other trustee, can be in any way taken by surprise by the production of those letters, written by Mr. Blenkinsopp to Mr. Trotter, in the hands of the trustees, and referred to, as I think, with sufficient distinctness by the bill. The letters written after the date of the deed do not shew so much of the design existing before the date of the deed, as was accomplished by the deed, but they do shew the same design to defeat the remedy of the plaintiff; and I cannot say I think the distinction very material, because the letters written before the deed are, in my opinion, quite sufficient to support the allegation contained in this bill. It is unnecessary for me to read those letters. I am of opinion that, upon the evidence consisting of the letters written before the deed, and from the other facts of the case, the principal, if not the whole, object of the defendant in executing the deed in question, was to withdraw his property from the process of the court in which the plaintiff was suing, and notwithstanding the provision therein made for the purpose of payment of certain debts and charges, it was a voluntary deed principally contrived and executed for that purpose. The question is, whether the Court has jurisdiction to set aside a voluntary deed executed for the purpose of the payment of money in such a suit. Mr.

Blenkinsopp denies that there is any ground of equity giving jurisdiction to this Court to interfere. The deed being executed on the 2nd of September 1842, is dated prior to any order for the payment of money under the authority of the Judicial Committee.

At that time the power of the Judicial Committee to enforce obedience depended on the 3 & 4 Will. 4. c. 41; but the two subsequent orders were dated the 22nd of April 1843, and at the time of their date could only be enforced under the same statute. The 6 & 7 Vict. c. 38. was passed in July 1843, and it was in force on the 31st of January 1844, when the report for a divorce and permanent alimony was confirmed; and on the 29th of April 1844, when the order was made for the payment of 282*l.* 13*s.* 9*d.* for costs. But in August 1844, the 7 & 8 Vict. c. 69. now in force was passed, and it was thereby enacted, section 12: "That in all causes of appeal to Her Majesty in Council from any courts, in which any person duly monished or cited or requested to comply with any lawful order or decree of Her Majesty in Council, or of the Judicial Committee or their Surrogates, made before or after the passing of this act, shall neglect or refuse to pay obedience to such lawful order or decree, or shall commit any contempt of the process, it shall be lawful for the said Judicial Committee or their Surrogates to pronounce such person to be contumacious and in contempt, and, after he shall have been so pronounced contumacious and in contempt, to cause process of sequestration to issue under the seal of Her Majesty against the real and personal estate of the person, in order to enforce obedience to the same and payment of the expenses attending such sequestration, and to make such further order in respect to such real and personal estates sequestered thereby as may be necessary." I am of opinion that whatever difficulties might have occurred under the former statutes, the Judicial Committee and their Surrogates had, under this statute, at least authority to cause process of sequestration to issue to compel obedience to all the orders in question, as far as obedience could be compelled by means of the writ of sequestration, and under the writs

of the 13th of December 1844 and the 5th of July 1845, the Commissioners therein named were fully authorized to take possession of the real and personal estate of the defendant.

It was argued that this was not all that might have been done, for that by the 3 & 4 Will. 4. c. 41. powers are given to the Judicial Committee to examine witnesses, to make inquiries, and direct issues to ascertain the facts, the due exercise of which powers, it is said, would have enabled the Judicial Committee to give relief to the plaintiff, if she had been entitled to relief without coming to this Court; and further, if sufficient power was not given, it must be concluded it was not intended to give it, and that the giving relief would be in effect introducing into such cases a new law. But the powers referred to do not extend to cases like the present; certainly it is no new law to use the authority of a court of equity to prevent fraud, or relieve from the effect of a fraud, or to give assistance to enforce the judgments, or decrees, or sentences of other courts of competent and lawful jurisdiction, when the execution of such judgments, decrees, or sentences are defeated or obstructed by fraudulent contrivances, or where an adverse title is attempted to be created for the purpose of defeating such judgments which does not extend to the whole interest in the property on which the judgment is proposed to be executed, and although the deed was executed before any right was declared; yet as it appears to me that the deed was executed for the purpose of defeating the right which the defendant knew the plaintiff was entitled to establish, I think it must be considered to have been executed with a view and intention to defraud her; and to permit it to have effect as against her, especially as to any rights not founded on valuable consideration, would give effect to that fraud. My opinion is not founded on any notion of lien which the suit in the ecclesiastical court gave to the plaintiff on the property, but to this, that the plaintiff having established her right, and it appearing by the writ of sequestration that she is entitled to be paid out of the defendant's real and personal estate; and it appearing further that she cannot have the benefit of the thing to which she is entitled by means

of a fraudulent act of the defendant, concocted for the purpose of defeating the right which is now established, and the Court in which the right is established having no jurisdiction to lay hold of the beneficial interest which remains in the defendant, and it being within the jurisdiction and the duty of this Court to lend its aid in such a case, I think the plaintiff is entitled to some relief; but I do not think that the relief to which she is entitled can extend to defeat the interest of the defendants who are *bond fide* creditors, payment of whose debts was provided for by the deed, and who are not yet paid. It appears to me, therefore, I ought to declare that, as against the plaintiff, and except as to persons having *bond fide* charges or being *bond fide* creditors of the defendant, whose charges and debts were thereby secured or provided for, the deed of the 2nd of September 1842 was fraudulent and void, and that the plaintiff was and is entitled to be paid such several sums of money as were ordered to be paid to her as aforesaid, and all such other sums of money as since the date of the said orders have become or may hereafter become due to her under the said order of January 1844; and therefore I must decree, that the defendants Messrs. Fenwick and Trotter, subject to the payment of such debts and charges, ought to be decreed trustees of the estates and effects conveyed and assigned to them for the plaintiff, so far as should be necessary to secure the money due to her as aforesaid; and I must direct an account to be taken of the *bond fide* charges and debts which were secured and provided for by the deed, which remained due and owing on the 1st of January 1846, the day of the institution of the suit, and also an account of the sums received and paid by the defendants the trustees since that time, and an account of the sums of money now due to the plaintiff under the orders: and with respect to the defendants who are here in the character of persons entitled to charges, I am of opinion the plaintiff is entitled to no relief: and, consequently, the bill must be dismissed, and dismissed with costs, as against them; but those costs are to be recovered over against the defendant.

L.C. } PADLEY v. THE LINCOLN WA-
Jan. 16. } TERWORKS COMPANY.

Discovery—Arbitrator—38th Order of August 1841.

A. contracted with a company to execute, for a specified sum, certain works, subject to such omissions therefrom and additions thereto as might be directed by H. the engineer of the company. The contract provided that the value of such omissions and additions should be estimated according to a schedule of prices in cases where the same would apply, and where not, by the valuation of H; that the certificate of H. should be necessary to authorize any payment to A, and that in case of any dispute touching the contract, the award of H. should be final. H. having given his final certificate of the balance due, A. filed his bill for an account against the company and H, stating that certain variations directed to be made were respectively of a specified amount, and that H. had declined to make any estimate of such works, and charging that the said certificate was a fraudulent contrivance of the company and H, for the purpose of enabling the company to avoid paying the amount justly due to the plaintiff. The bill interrogated H. as to whether the particular items were not of such an amount respectively as stated. The defendant H, by his answer, denied fraud in general terms, and answered all the interrogatories except those which related to the amount in value of the particular items, which he declined to answer on the ground that, as arbitrator, he was not bound to disclose the data upon which his award was founded. Upon exceptions, held, affirming the decision of the Court below, that an arbitrator could not, by a general denial of fraud, protect himself from answering those facts which, if admitted, would tend to shew the fraud alleged.

The 38th Order of August 1841 does not enable a defendant, by his answer, to decline answering a question from which he could not, previously to the Order, have protected himself from answering by demurrer.

The bill in this case was filed by J. S. Padley, a contractor, against the Lincoln Waterworks Company, and against their engineer and their secretary, and it prayed that an account might be taken of the

amount due to the plaintiff for work done by him for the defendants, the company, under a memorandum of agreement of the 2nd of November 1846, including additional works. The bill, after setting out the Lincoln Waterworks Act, 1846, whereby the company were authorized to construct certain reservoirs, aqueducts, &c. at the places in the said act mentioned, stated that in September 1846 the company advertised for tenders for making a reservoir at Skillingthorpe and other works connected therewith, in accordance with specifications and plans which had been prepared by the defendant, J. Hawksley, the company's engineer, and that the plaintiff sent in a tender for such works, which was accepted by the company on the 20th of October 1846, at the sum of 4,500*l.*; and that on the 2nd of November 1846 a memorandum of agreement was entered into between the plaintiff and the company, whereby the plaintiff undertook to execute the works therein specified for the sum of 4,500*l.*, subject to such additions thereto or deductions therefrom for any alterations that might be directed by the company or their engineer, according to the prices in the schedule at the end of the specification; and the company agreed, upon the works being made as aforesaid, to pay to the plaintiff the said sum of 4,500*l.*, or so much as should be due from them according to the terms of the specification. In the specification at the foot of the agreement it was provided, that "the plans and sections of the said reservoir, together with the specification, shall be deemed the data upon which the contract shall be founded; and no alterations or deviations which may be directed or executed under the powers and provisions herein contained shall invalidate such contract, but due allowance shall be made or taken as the case may require in respect of any alterations or deviations, and according to the prices in the schedule annexed where the same may apply, and in other cases, according to such admeasurement and prices as the engineer to the company may make and fix." And that the contractor should finally complete his undertaking to the full satisfaction of the engineer on or before the 1st of March next ensuing; that, after providing for the periodical payments to be

made by the company to the contractor during the progress of the work, it was provided that in all cases the engineer's certificate should be necessary to authorize a payment to the plaintiff; and that "in case of any doubt, dispute, or difference of opinion arising respecting the meaning and intention of the contract or of this specification, such doubt, dispute, &c. shall be settled and determined by the engineer, whose decision, admeasurements, valuations, and awards shall be final and binding upon all the parties interested therein, and may be made a rule of court." That the plaintiff commenced the said works, and during the progress thereof various alterations and additions in and to the same were directed to be made by the defendant Hawksley and his deputies, as to some of which works the prices were not fixed by the said schedule of prices, and as to other of which the prices were fixed by the said schedule.

The bill then stated that the works so directed to be omitted, and the prices whereof were fixed by the said schedule, amounted on the whole to the sum of 963*l.* 12*s.* 11*d.*, and the works so directed to be omitted and the values whereof were not capable of being ascertained by the schedule of prices at the end of the said specification, amounted, according to a fair valuation thereof, made by the plaintiff, to the sum of 70*l.* 19*s.*; but that the defendant Hawksley had hitherto refused and still refused to make any estimate of such last-mentioned works, and the defendants, the company, disputed the estimate thereof made by the plaintiff; that the additional works and variations so as aforesaid made by the plaintiff, pursuant to the said agreement, and the value whereof could be ascertained by the said schedule of prices, amounted to the sum of 1,275*l.* 3*s.* 11*d.*; and that the additional works and variations so as aforesaid made by the plaintiff, pursuant to the said agreement, the value whereof could not be ascertained by the said schedule of prices, amounted to the sum of 263*l.* 7*s.* 4½*d.*, and that the whole amount of the works done by the plaintiff for the company under the said agreement, after allowing for works so omitted to be done as aforesaid, amounted together to the sum of 5,003*l.* 19*s.* 4½*d.*; that during the pro-

gress of the said works the engineer gave to the plaintiff several certificates of work done, by virtue of which the company paid to the plaintiff various sums; and that, after such payments, there remained due to the plaintiff the sum of 1,604*l.* 14*s.* 1½*d.* or thereabouts, in respect of work done under the said agreement; that the plaintiff had applied to the company for the payment of such balance, but that the defendant Hawksley, combining and confederating with the defendants, the company, had from time to time refused or declined, and still refused or declined, to give the plaintiff any further certificate for the payment of such balance; and that the company refused to pay any further sum of money to the plaintiff without receiving a further certificate from the defendant Hawksley; that on the 18th of August 1848 the defendant Hawksley, by the direction of the company, prepared, signed, and delivered to the plaintiff a certificate of that date, in the words and figures following:—

“Lincoln Waterworks Company.—I do hereby certify that Mr. J. S. Padley is entitled to receive the sum of 544*l.* 7*s.* 1½*d.* as the final balance due to him for all the works, and also for all the alterations, additions, and extra works done under or in pursuance of, or arising upon or out of his contract with the directors of this company. Dated the 2nd of November 1846. As witness my hand this 18th day of August 1848.

(Signed) “T. Hawksley,
Engineer to the said company.
“To Thomas Carline, Secretary
to the said company.”

The bill then charged that the last-mentioned certificate of the defendant Hawksley was in fact a mere contrivance of the defendants, the company, and Hawksley, for the purpose of enabling the defendants, the company, to avoid paying the plaintiff the amount so as aforesaid justly remaining due to him, and that the defendants, the company, and T. Hawksley had, since the 17th of May 1847, been and then were combining and confederating together for the purpose of compelling the plaintiff to take from the company a sum much less than the amount justly remaining due to him under and by virtue of the said agreement; and as evidence thereof the bill

charged that Hawksley had, from time to time, refused to give any certificate of the amount justly due to the plaintiff as aforesaid; that the whole of the works required to be done by the plaintiff under and by virtue of the said agreement, including the alterations and additions required by the company before the 28th of March 1847, with some trifling exceptions, not exceeding in value the sum of 70*l.*, were fully completed by the plaintiff on the 28th of August 1847. The bill then charged that by want of such certificate the plaintiff was unable to recover the amount then remaining justly due to him by means of any action at law, or otherwise than by proceedings in equity, and that the accounts between the plaintiff and the company, in respect of the works so done as aforesaid, were of a complicated nature, and could not be properly taken in any action at law.

By the ninth, tenth, and eleventh interrogatories, the defendant Hawksley was called upon to set forth, whether the works so directed to be omitted, and the prices whereof were fixed by the said schedule of prices at the end of the said specification, did not amount in the whole to the sum of 963*l.* 12*s.* 11*d.*, or to some other and what sum; and whether the works so directed to be omitted, and the values whereof were not capable of being ascertained by the prices at the end of the said specification did not amount, according to a fair valuation thereof made by the plaintiff, to the sum of 70*l.* 19*s.*, or to some other and what sum; and whether the said Thomas Hawksley had not hitherto refused, and whether he did not still refuse to make any estimate of such last-mentioned works, and why. Tenth, whether the additional works and variations so as aforesaid made by the plaintiff, pursuant to the said memorandum of agreement, did not amount together, according to the said schedule of prices, to the sum of 1,275*l.* 3*s.* 11*d.*, or to some other, and what sum; and whether the additional works and variations so as aforesaid made by the plaintiff, pursuant to the said agreement, the value whereof could not be ascertained by the said schedule of prices, did not amount to the said sum of 263*l.* 7*s.* 4½*d.*, or to some other, and what sum. Eleventh, whether the whole amount of the works done by

the plaintiff for the defendants, the company, under and by virtue of the said memorandum of agreement, after allowing for the works so omitted to be done as aforesaid, did not amount together to the sum of 5,003*l.* 19*s.* 4½*d.*, or to some other, and what sum, or how otherwise.

The defendant Hawksley, by his answer, stated that he had, at the request of the plaintiff, made his final certificate of the sums which, in his judgment or to the best of his belief, the plaintiff was entitled to receive, after giving credit for the sums already received. "And this defendant submits to the judgment of the Court whether he ought to be required to set forth, and he declines to set forth the data upon which his calculations were founded, or whether the works so directed to be omitted, and the prices whereof were fixed by the said schedule of prices, did amount in the whole to the sum of 963*l.* 12*s.* 11*d.*, or to any other, or what sum." "And whether the works so directed to be omitted and the value whereof were not capable of being ascertained by the said schedule of prices, did amount, according to a fair valuation thereof made by the said complainant, to the sum of 70*l.* 19*s.*, or to any other, or what sum." "And this defendant saith, he hath at all times made his calculations in the matters in the said bill mentioned, after taking into account all the works done by the said complainant, and has given his certificate accordingly; and he denies that he has hitherto refused, or doth still refuse, to make any estimate of such works, &c. And this defendant saith he made all the calculations and estimates upon which such certificates were founded fairly and to the best of his judgment." "And he submits whether he ought to be required to set forth, and he declines to set forth, whether the additional works and deviations so as aforesaid made by the said complainant, pursuant to the said memorandum of agreement, did amount together, according to the said schedule of prices, to the sum of 1,275*l.* 3*s.* 11*d.*, or to some other, and what sum, And whether the additional works and variations so as aforesaid made by the said complainant, pursuant to the said memorandum of agreement, the value whereof could not be ascertained by the

said schedule of prices, did amount to the sum of 263*l.* 7*s.* 4½*d.* or to some other, and what sum, or how otherwise; or whether the whole amount of the works done by the said complainant for the said Lincoln Waterworks Company, under or by virtue of the said memorandum of agreement, after allowing for the works so omitted to be done as aforesaid, did amount together to the sum of 5,003*l.* 19*s.* 4½*d.*, or to some other, and what sum, or how otherwise." "And this defendant saith he fairly and honestly decided upon the amount justly due to the said complainant from the said company, and he verily believes that the sum of 544*l.* 7*s.* 1½*d.* is the full amount which is justly due to the complainant from the said company." The answer then proceeded to negative the charges of contrivance and collusion by and between the defendants, Hawksley and the company, in the making of the said final certificate, and insisted that the works done by the plaintiff were so imperfectly done that the company were put to great additional expense in employing other competent persons to complete the same.

The plaintiff took exceptions to the defendant Hawksley's answer, for insufficiency in respect of the ninth, tenth, and eleventh interrogatories, and the Master held the answer to be sufficient.

Exceptions being taken to the Master's report, the Vice Chancellor Knight Bruce allowed the exceptions.

The exceptions now came on to be heard, by way of appeal, before the Lord Chancellor.

Mr. Bacon and *Mr. Glasse*, for the appellants.—The defendant Hawksley has answered the bill in all other respects, except where it seeks a discovery from him as to various details of the works, for the purpose of shewing that the certificate is erroneous. The defendant says that, being the arbitrator between the parties, it was his duty to make the award, and he objects to set out the grounds on which he arrived at his judgment. He says, in effect, "In discharge of my duty as arbitrator, I have certified a certain sum to be due to you, and I decline to shew you how I have arrived at that judgment."

[The LORD CHANCELLOR. — That is, whether I have omitted certain items or not.]

The bill asks whether certain items have amounted to a certain sum. The question is, whether a person who has been chosen as arbitrator by both parties, and whose decision upon the matter is to be final, is, after having made his award, to be called upon to set forth the grounds upon which he arrived at the result. Nothing could be more opposed to the established rule as to arbitrators. The defendant has not pleaded or demurred, but he has, in the way the practice of the Court enables him to do, by his answer, objected to answer these particular questions. The fraud charged is wholly denied by the answer.

[The LORD CHANCELLOR.—Is he, by denying fraud generally, to protect himself from discovery?]

The questions are wholly irrelevant, except fraud is proved; and if fraud is proved, the plaintiff wants no discovery. He could not be entitled to relief by shewing that the arbitrator had made a mistake. If the defendant had pleaded the award, he must have accompanied his plea with a denial of fraud. In an *Anonymous case* (1) the plea of an arbitrator was allowed; so in *Lingood v. Croucher* (2), *Steward v. the East India Company* (3) and *Scougull v. Campbell* (4).

[The LORD CHANCELLOR.—The rule was formerly understood to be, that a defendant who had submitted to answer, must answer everything; and it was considered generally that the Master could not enter into the question whether an interrogatory was material or not. Some Masters thought they might; and in order to remove that difficulty, an Order (38th Order of the 26th of August 1841 (5).) was made, giving the defendant power, by his answer, of stating reasons why he did not answer or declined to answer; but that was confined to those questions which before were considered immaterial, and which the party might have demurred to; and the order, therefore, is, that a party may now, by answer, decline to answer any question from which he might have protected himself by demurrer.

(1) 3 Atk. 644.

(2) 2 Ibid. 395.

(3) 2 Vern. 380.

(4) 1 Chit. 283.

(5) Ord. Can. 175; 10 Law J. Rep. (N.S.) Chanc. 144.

How, in this case, could the defendant protect himself from answering by demurrer? If he could not, he is not within the Order. All the cases are as to pleas.]

Steward v. the East India Company was a case upon demurrer.

[The LORD CHANCELLOR.—It is very difficult to understand that case; the demurrer admitted all the facts; fraud was charged, and yet the demurrer was allowed.]

We submit, then, that these particular questions are immaterial; and the submitting that he is not bound to answer, amounts to a demurrer.

Mr. Wigram and *Mr. Hallett*, contra, were not heard.

The LORD CHANCELLOR.—It appears to me very clearly that the Vice Chancellor is right, and on this simple ground. It is true the arbitrator, if he takes proper means to protect himself and to clear himself from the imputation of fraud, is not bound to state the reasons of his award, because he is the Judge; and if he has not deprived himself of his character of arbitrator, he has a right, under that character, to protect himself. But if any fraud is imputed, he must so frame his defence as to disprove the imputation of fraud, otherwise that takes away the protection which belongs to the character of arbitrator. Here are certain facts alleged to shew improper collusion between him and other parties. It is stated in general terms to be a fraud, and particular facts are alleged as evidence of that fraud. He does not at all protect himself from that charge by denying the result of those facts. He does not protect himself by negating those from which the fraud is inferred, but he denies the general result; and by so doing he takes upon himself to be the judge in his own case, and to say he is not guilty of a fraud. He may not call it fraud, but probably the Court may call it so, and as long as those charges are suggested against him which are alleged to shew the fraud, and until there is an opportunity of trying the whole truth, he has no means of protecting himself from the imputation of fraud, and, therefore, cannot refer to the character of arbitrator for the purpose of protection. Upon the

merits, having submitted to answer, I think that he is bound to answer those, which are clearly not immaterial questions, for the purpose of the case as stated by the bill. He admits he cannot decline to answer those questions under the Order, because they are questions as to which he could not demur; consequently, the Order does him no good, and anterior to that Order those questions were not so immaterial that they could have been demurred to. Therefore, there is not only the principle of the Court as to arbitrators, but there is the form and rule of the court, which would compel him to answer those questions. There being circumstances, by which, if they should be admitted, the plaintiff contends that the fraud which he imputes would in some degree be established, I am clearly of opinion that as the matter stands upon these pleadings, the defendant is bound to answer those questions; and the appeal will, therefore, be dismissed, with costs.

L.C.
Feb. 27. }
March 2. }

HIRST v. TOLSON.

Solicitor—Articled Clerk—Death of the Master within the Term—Return of Premium.

*In November 1845 A, an infant, was bound as an articled clerk to B, an attorney and solicitor, for the term of five years, and a premium of 200*l.* was paid to B. by the mother of A; and in consideration thereof, B. covenanted with the mother that he would teach and instruct A. in the practice of an attorney and solicitor, which B. did then or should during the said term use or practise. In October 1847 B. died. In a suit by A. and his mother against the executors of B, the Court referred it to the Master to inquire and state what proportion of the premium ought to be returned. Upon appeal, the decree was affirmed.*

By articles of agreement, dated the 6th of November 1845, and made between Richard Tolson, a solicitor, since deceased, of the one part, and the plaintiffs, Sarah Hirst and Henry S. Hirst, then an infant

of the age of sixteen years, of the other part, Henry S. Hirst was bound as articled clerk to Richard Tolson for the period of five years then next ensuing; and in consideration of the sum of 200*l.* paid to Richard Tolson by Sarah Hirst, Richard Tolson covenanted with Sarah Hirst that he would accept Henry S. Hirst as his clerk, and also would, to the utmost of his skill and knowledge, teach and instruct him, or cause him to be taught and instructed, in the practice or profession of an attorney and solicitor, which the said Richard Tolson then did or should at any time thereafter, during the said term, use or practise. Henry S. Hirst entered into the service of Richard Tolson as such articled clerk, and continued in such service until the death of Richard Tolson.

In October 1847 Richard Tolson died, having by his will appointed the defendants, Sarah E. Tolson, J. W. Wasney, and George Dryden, his executrix and executors. Upon the death of Richard Tolson, Sarah Hirst applied to his executors for a return of a proportionate part of the premium of 200*l.* The executors declining to comply with such demand, Sarah Hirst and Henry S. Hirst filed their bill against the executors of Richard Tolson, praying that the defendants might be decreed to repay and return to the plaintiff Sarah Hirst, out of the assets of Richard Tolson, a due and just proportion of the premium of 200*l.*, and that it might be declared by the Court what was the just and proper proportion to be returned; and that the defendants, out of such assets, might be decreed to pay the costs of this suit, and that the defendants might either admit assets, or that the accounts might be taken.

The defendants, by their answer, admitted assets, and stated that the testator shortly before his death had taken into partnership in his business, as an attorney and solicitor, one Charles Clough, who, since the death of the testator, had carried on, and still continued to carry on, the said business; and that on the death of the testator it was arranged between the defendants and Charles Clough, that the latter should take Henry S. Hirst as his clerk for the remainder of his articles, without any premium, and such arrange-

ment was communicated to Henry S. Hirst; and they submitted that the plaintiffs were not entitled in equity to any relief against the defendants in respect of the matters in the bill mentioned, but that their remedy, if any, was at law.

The Vice Chancellor of England, by his decree, referred it to the Master to inquire and state what part of the premium ought to be returned, and that the defendants should pay the same to the plaintiffs, together with the costs of the suit—18 *Law J. Rep.* (N.S.) Chanc. 308.

The defendants appealed from that decree.

Mr. Rolt and *Mr. Rogers*, for the plaintiffs.—The Court has a clear jurisdiction to order a return of part of the premium where the relation of the parties is put an end to by the death of the master—*Soam v. Bowden* (1) and *Newton v. Rowse* (2). So also where the relation is determined by the act of the master—*Lockley v. Eldridge* (3) and *Therman v. Abell* (4). So also in the case of the bankruptcy of the master—*Ex parte Sandby* (5). The executors of the deceased master have no right to depute another person to fulfil the obligations of their testator—*Pearce v. Chamberlain* (6).

Mr. R. Palmer and *Mr. Amphlett*, for the defendants.—The remedy of the plaintiffs, if any, is at law, for this is a legal contract; but a contract to serve on the one side and to instruct on the other, is discharged by the death of one of the parties—*In re Thompson* (7). In the cases of *Wadsworth v. Gye* (8) and *Soam v. Bowden* there was a contract to maintain as well as to instruct, and that distinguishes those cases. The summary jurisdiction of courts of law is only exercised where both parties are living. The only authority for the jurisdiction in equity is the case of *Newton v. Rowse*, where it is stated in a note that the pleadings set up a case of fraud.

[The LORD CHANCELLOR.—The Court could not have acted upon that ground, or

it would have ordered the whole premium to be returned. In *Hale v. Webb* (9) the Court assumed the jurisdiction to order a return of the premium, but refused relief upon other grounds. Here the party has paid a premium for a consideration which is never performed; and though the remedy is at law, there is no possible objection to a party coming into equity in a suit to administer assets. In the case of *Stokes v. Twitchen* (10) Gibbs, C.J. assumed that the party would be entitled to recover the money as paid without consideration; but he refused relief on the ground of the plaintiff having been cognizant of a fraud upon the revenue.]

The cases of *Hale v. Webb*, *Argles v. Heaseman* (11), and *Cuff v. Brown* (12), are all opposed to the plaintiffs' claim.

Mr. Rolt replied.

The LORD CHANCELLOR.—This is an unfortunate case, and I should think it more unfortunate if I considered it necessary to send the parties to law. The case is one which often occurs, namely, where the master of an articulated clerk dies before the term of his articles has expired, and thereby the clerk loses the benefit for which his friends have contracted and have paid a premium. The estate of the master is administered in this court; and whether the claim is at law or in equity, the question is a proper subject to be entertained in this court. The Court is not in the habit of sending all creditors to law who come here to prove their debts. Where a question of great difficulty arises, it may be expedient to send it to law; but it is not necessarily the practice of the Court to do so. I cannot but think that the personal representatives would have remembered better what was due to the memory of the deceased, if they had not endeavoured to take advantage of this objection to defeat this young man's just claim; but as they have pursued that course, it is my duty to decide upon the strict rights of the parties. If this had been a mere question on the covenant, this Court would not have entertained original

(1) Rep. temp. Finch, 396.

(2) 1 Vern. 460.

(3) Rep. temp. Finch, 124.

(4) 2 Vern. 64.

(5) 1 Atk. 149.

(6) 2 Ves. 35.

(7) 1 Exch. Rep. 864.

(8) Sid. 216.

(9) 2 Bro. C.C. 78.

(10) 2 Moore, 538; s.c. 8 Taunt. 492.

(11) 1 Atk. 518.

(12) 5 Price, 297.

jurisdiction, but would have left the matter to law, where it would have rested in damages, which a jury must assess, upon the breach of covenant. But if, on the other hand, independently of that, there is a right existing from the transaction itself, and which would have existed if there had been no covenant, that is, a right to a return of a proportion of the premium paid, on the ground that the consideration for which it was paid had failed, that is a ground for an equitable action for money had and received; and the Court will administer this equity in disposing of the estate of the intestate. I am of opinion that in this case the transaction, independently of the covenant, gives the plaintiff a right to recover back a proportionate part of the money so paid, on the ground that the instruction has failed. In *Stokes v. Twitchen*, Gibbs, C.J. assumes that the plaintiff was certainly entitled to recover back the money so paid; but the articles did not contain a statement of the premium which had been paid, and the question was, whether this arose from error or fraud; and the Chief Justice was of opinion that the plaintiff ought not to recover, because it was an attempt to defraud the revenue. Whether the consideration fails by the act of the party or by the death of the party is immaterial. The money is paid in anticipation of a future benefit, which the party is prevented from receiving. Here the plaintiff has paid money for instruction which he cannot now enjoy. Upon such a state of things the authorities establish that from the transaction an equity arises independent of the covenant. If that is so, has the party a right to come against the intestate's estate? No one can doubt it. I find so early as the case in 1 *Vern. Rep.* no question was raised as to the jurisdiction of the Court. It was not only entertained to that extent, but carried further in *Newton v. Rowse*. It is difficult to discover in that case upon what grounds the apportionment was made; but the case is a distinct authority for an apportionment. In modern times this principle has been applied in the administration of estates. In *Hale v. Webb* Lord Kenyon, having the full matter before him upon an application against the executors of the master for a return of the premium, never doubted

the jurisdiction, but decided the case upon the special ground that the parties had agreed to cancel the articles. If the Court has jurisdiction against a living master, *à fortiori* it must have against the estate of a deceased master. If the principle has been admitted at law in an action for money had and received, what reason is there for saying that this Court has not jurisdiction? The only matter for consideration is, whether this right is so clear that the Court can adjudicate upon it without sending it to law first. I think there is a debt at law, and also a debt in equity, and that the case is one in which the plaintiffs, having such debt, have a right to payment of such debt in the administration of the estate. The appeal, therefore, must be dismissed, with costs.

M.R. }
May 3, 4. } SHALLCROSS v. WRIGHT.

Executor—Liability—Payments—Implied Contract—Physician—Remuneration—Attendance.

F. B. died, at the house of H, of a contagious disease, and, under the advice of medical men, H. removed from his house with his family while it was cleansed, and the room where F. B. died fumigated. H, also to prevent infection, destroyed all the furniture in the room where F. B. died; and his executor paid to H. 160l. as a compensation for his loss, &c.; and upon exceptions to the Master's report disallowing the payment,—Held, it being both necessary to remove and a duty to destroy the furniture, that an implied contract existed, and that the executor was entitled to be allowed the payment, but that the parties were entitled to further inquiry; and the exception was allowed, with costs.

A physician attended F. B. during several of the last years of his life without any payment being made to him, but upon some understanding that remuneration was to be made by a legacy, which was not done, and the executor paid to the physician 100l. as a remuneration for the services performed, which the Master disallowed. Upon exceptions to the report,—Held, that there was nothing to raise an implied contract; that

the executor had placed himself in the situation of the physician and was not entitled to have the payment allowed; and the exception was overruled, with costs.

This cause came before the Court upon exceptions to the Master's report, taken by the defendant, Charles Wright, one of the executors of Francis Brookes, deceased. The first exception was on the ground that he had not allowed him, in his discharge, the sum of 160*l.*, paid to Major Hawkes as an indemnity or compensation for the destruction of certain of his furniture and for the expenses of himself and family while residing at an hotel at Leamington, in consequence of the testator's death from typhus fever while staying at the house of Major Hawkes on a visit to him as a friend.

The second exception was on the ground that the Master had not allowed to the defendant, Charles Wright, on his discharge, the sum of 100*l.* paid by him as one of the executors of the said testator to Dr. Knight, for his attendance on the testator as a physician during several years.

From the affidavits it appeared that Francis Brookes went to Leamington for the benefit of his health, and resided at the house of Major Hawkes, the master of the ceremonies, where he subsequently died of malignant typhus fever. Major Hawkes, under the advice of the physician and medical attendants of Francis Brookes, and to prevent a spread of contagion, removed himself and family to an hotel while the house was fumigated, painted, and white-washed; and to prevent infection Major Hawkes, under the like advice, destroyed the bed and bedding on which the deceased died, and also the furniture of the room, which had been new within two years and was of a costly description, and a considerable quantity of linen and other goods. The rooms and interior of the house generally were forthwith whitewashed, cleansed, and fumigated at the expense of Major Hawkes, and during all this time he, with his wife and nine children, and an establishment of five servants, resided at an hotel, which, from his being master of the ceremonies, it was necessary should be of such a description that persons visiting the Spa might be introduced to him. In consequence of this Charles Wright, the executor of Francis

Brookes, paid to Major Hawkes the sum of 160*l.* as a compensation, to which he considered himself entitled, for his expenses and the destruction of his property; but this sum the Master refused to allow.

Dr. Knight, in his affidavits in support of the second exception, stated that he had practised at Stafford as a physician for thirty years; that he attended Francis Brookes, who declared his intention of making payment for the same; that for many years previous to his decease he attended him, more frequently as his maladies increased, and for the last year he was in almost constant attendance, frequently at night, though Moss Hill, the residence of the deceased, was two miles from Stafford; and that after the death of Francis Brookes his executors paid him 100*l.* as a compensation for his professional services, which, if the remuneration had been made after the rate usually allowed to physicians, would have been much larger. He also stated that Francis Brookes promised to pay him for his services or leave him an equivalent; but that he had never received any sum of money for the professional services he had rendered to Francis Brookes.

Mr. Roupell and Mr. Villiers in support of the exceptions.—Major Hawkes is entitled to a remuneration for his loss. The injury was done by the deceased; an implied contract was raised; and the executors ought not to be subject to an action for a duty cast upon them by their office. With respect to the second exception, Dr. Knight had attended under the impression that he was to be paid. Promises had been made to Dr. Knight; but was that to be considered as an equivalent, and to be in lieu of payment?

2 *Black. Com.* 443, 18th edit.

Jenkins v. Tucker, 1 H. Black. 90.

Tugwell v. Heyman, 3 Camp. 298.

Rogers v. Price, 3 You. & J. 28.

Wentworth v. Tubb, 1 You. & C. C. C.

171; s. c. 12 Law J. Rep. (N.S.)

Chanc. 61; and 2 You. & C. C. C. 537.

Williams v. Wentworth, 5 Beav. 325.

These are cases of implied contract.

Mr. Turner and Mr. Elderton, for the plaintiff, said the sums disallowed were

paid out of an insolvent estate. Had F. Brookes lived and Major Hawkes been forced to destroy his furniture, he could not have brought any action. It might as well be said there was a charge for extra food: it was a work of charity. The cases cited were cases of necessity. There was also nothing to shew that the disease was not contracted at the house of Major Hawkes. With respect to Dr. Knight, he took his chance whether the testator would leave him a legacy or not.

Mr. Walpole and Mr. G. L. Russell, for the next-of-kin of F. Brookes.—*Nelson v. Duncombe* (1), *Chorley v. Bolcot* (2).

THE MASTER OF THE ROLLS.—No further discussion is necessary on the first exception. There are cases of necessity, in which an executor is called upon to act. It is his duty to bury a dead body, that is to be done for the benefit of the living, and it raises a consideration for an implied contract. In this case it was absolutely necessary to remove the furniture, as the deceased had died of a disease so highly contagious that it became necessarily a duty to remove it. As there was both a necessity and a duty, it raised a right to be remunerated. The parties, however, are not bound by the report. They are entitled to further inquiry, if they desire it.

Mr. Roupell, in reply upon the second exception.—There is nothing which shews that Dr. Knight volunteered his services or agreed to accept any equivalent. The executor, feeling the obligation he was under, paid the amount—*Veitch v. Russell* (3).

THE MASTER OF THE ROLLS.—Dr. Knight had gone on from year to year attending the deceased, but it was in the hopes of receiving a legacy. There does not appear to be anything to raise an implied contract. I must therefore overrule this exception; and if the executor takes upon himself to pay the amount he places himself in the situation of the party. I cannot have it

allowed, as it was paid without any consideration. I must, therefore, allow the first exception, and overrule the second, with costs.

V.C. }
May 7. } *In re WEBBER'S SETTLEMENT.*

Next-of-kin—Statute of Distributions—Construction of a Settlement.

In a marriage settlement, a sum of stock was given to trustees, after the death of the husband and wife, upon trust, in case the wife died first, "for such person or persons as at the time of the death of the husband should be the next-of-kin of the wife, and would be entitled to her personal estate and effects, his, her and their executors, administrators and assigns, as if she had died sole and unmarried." The wife died first, leaving five brothers and sisters. On the death of the husband only one brother was living, but there were children of the other brothers:—Held, that the brother surviving at the death of the husband took the whole fund, as the next-of-kin designated in the settlement.

This was the petition of Thomas Webb, which stated that, by an indenture, dated the 27th of May 1813, made upon the marriage of John Webber and Ann Webb, a sum of 378*l.* consols was transferred into the names of the trustees of the settlement, upon trust to pay the dividends to the said Ann Webb for life, for her separate use; and in case she should survive the said John Webber then upon trust for the said Ann Webb, her executors, administrators and assigns; but in case the said Ann Webb should die in the lifetime of the said John Webber, then in trust for such persons as the said Ann Webb should by deed or will appoint, and for want of such appointment upon trust to pay the dividends to John Webber for his life, and after his decease the trustees were to stand possessed of and interested in the said trust monies, "for such person or persons as at the time of the death of the said John Webber should be the next-of-kin of the said Ann Webb, and would be entitled to her personal estate and effects, his, her and their executors, administrators and assigns, as if she had died sole and unmarried." The

(1) 9 Beav. 211; s. c. 15 Law J. Rep. (N.S.) Chanc. 296.

(2) 4 Term Rep. 317.

(3) 3 Q.B. Rep. 928; s. c. 12 Law J. Rep. (N.S.) Q.B. 13.

petition stated that Mrs. Webber died during her husband's lifetime without leaving any issue, and without having made any appointment of the trust funds comprised in the settlement; that John Webber died afterwards in the month of March 1849; that the said Ann Webber left at the time of her decease, five brothers surviving her, that is to say, the petitioner, and four others who all died in the lifetime of John Webber, leaving children; that the trustees of the settlement had paid the trust funds into court under the Trustee Act. The petition prayed that the said trust funds might be transferred and paid to the petitioner.

Mr. Stuart and *Mr. Law* appeared in support of the petition, and contended that the petitioner being the eldest brother of Mrs. Webber, was entitled to the whole of the stock as her next-of-kin living at the death of her husband. There could be no doubt that according to the ultimate limitation in the settlement, the period at which the persons composing the class of next-of-kin of Ann Webber were to be ascertained was the death of her husband, and not the period of her own death. It was also clear that a gift or limitation to the next-of-kin of an individual, in the absence of any words importing a reference to the Statute of Distributions, comprised those only who were her next or nearest of kin according to the natural and literal meaning of the words, and not those who would be entitled by right of representation under the Statute of Distributions. It was true that where there was an intestacy, and the division of property was to be made under the statute, nephews and nieces of the intestate, as representing their deceased parents, would be entitled to share with the brothers and sisters of the intestate living at his death; but in this case the persons entitled to take must be ascertained from and could only take under the expressions made use of in the ultimate limitation in the settlement, and not as if there were an intestacy. The only doubt that could arise was upon the words "and would be entitled to the personal estate as if she had died sole and unmarried," whether those words could be held to import any reference to the Statute of Distributions; but it was

contended that they were not susceptible of such a construction, and that they were only used to express an anxious intention of excluding any claim on the part of John Webber the husband. The following cases were cited—

Elmsley v. Young, 2 Myl. & K. 780;

s. c. 4 Law J. Rep. (N.S.) Chanc. 200.

Withy v. Mangles, 4 Beav. 358; s. c.

10 Law J. Rep. (N.S.) Chanc. 391,

and

Brandon v. Brandon, 3 Swanst. 312.

Mr. Rogers and *Mr. Prior*, for the children of the deceased brothers of Mrs. Webber, contended that the words in the clause of the settlement clearly pointed out that the whole of the next-of-kin under the Statute of Distributions were intended to take, and therefore that the nephews and nieces of Mrs. Webber, who formed part of her next-of-kin at the decease of John Webber, were entitled to share with the petitioner.

Mr. Follett appeared for the trustees.

The VICE CHANCELLOR.—The rule in construing a deed is, that the first words are to controul the latter, and if the latter part of the clause be inconsistent with the former, the latter words must be disregarded. The question would be different if it arose upon the words of a will; but as this is a settlement, my opinion is that the petitioner is entitled to the whole of the fund, and the order must be made according to the prayer of the petition.

M.R. }
June 12; }
July 2. }

GRAY v. HAIG.
HAIG v. GRAY.

Practice—Original Bill and Cross Bill—Amendment of original Bill—Priority.

The rule, that a plaintiff in an original suit by amending his bill after a cross bill is filed loses his priority of suit, and cannot call upon the defendant to answer the amended bill, before he answers the cross bill, will not prevail, where exceptions being taken to the answer to the original bill for insufficiency, and allowed, the plaintiff under an order to amend, and for the defendant to answer the amendments and exceptions to—

gether, amended his bill after a cross bill filed, but having served notice of the order to amend, before he was served with the subpoena to answer the cross bill.

This was a motion by G. Gray to discharge an order of course, dated the 8th of April 1850, directing that Haig should have a month to put in his answer to the amended bill of the plaintiff G. Gray, after the latter should have put in his answer to the cross bill.

The original bill was filed on the 14th of January 1849 by the plaintiff G. Gray, the defendant to the second or cross suit.

Mr. Haig, the defendant in the first suit and the plaintiff in the second suit, put in his answer. Exceptions were taken for insufficiency and allowed by the Master on the 21st of March, and a month's time was given to Mr. Haig to answer the exceptions.

On the 21st of March Gray obtained an order to amend his bill without prejudice to an injunction which he had obtained, and that Haig might answer the amendments and exceptions together.

On the 27th of March Gray amended his bill in material parts, and filed a new engrossment.

On the 21st of March, the same day on which the order to amend was obtained, Haig filed a cross bill, and on the 22nd of March served a subpoena on Gray to appear and answer the cross bill, and on the 8th of April he obtained the order now sought to be discharged.

Mr. Lee, in support of the motion.—Mr. Gray is entitled to priority in respect of his suit, and before he answers the cross bill he has a right to an answer to the original bill.

Mr. Turner, for Mr. Haig.—Mr. Gray by amending his bill forfeited his priority of suit. Mr. Haig, therefore, is entitled to an answer to his cross bill before he can be required to answer the amended bill—

Long v. Burton, 2 Atk. 218.

Steward v. Roe, 2 P. Wms. 435.

Wigley v. Whitaker, 1 Beav. 349; s. c.

8 Law J. Rep. (N.S.) Chanc. 103.

Noel v. King, 2 Madd. 392.

De Tastet v. Lopez, 1 Sim. 11.

July 2.—The MASTER OF THE ROLLS.—It seems to be an established rule, that the plaintiff in the original suit, by amending his bill after a cross bill is filed, loses his priority of suit, and is not entitled to an answer to the amended bill until he has answered the cross bill. In this case the cross bill is filed on the 21st of March; the subpoena to answer was served on the 22nd of March, and the amendments were not filed until the 27th of March. The plaintiff would, were there nothing else, have lost his priority of suit. But this case differs from the others. Here, the order to amend was obtained and served before the subpoena to answer the cross bill was served. I therefore am of opinion that the plaintiff in the original suit ought not to be considered as having lost his priority of suit. I must, therefore, direct the order of the 8th of April to be discharged, without costs.

L.C.	}	GOODALE v. GAWTHORNE. SAME v. SAME.
1849.		
Nov. 9, 10.		

Practice—Two Suits on behalf of an Infant—Amendment of one Suit after an Order of Reference.

Two suits having been instituted by two different next friends on behalf of an infant, an order of reference was made in both suits as to which was most for the benefit of the infant. Subsequently to the date of the order, but before it was executed, a demurrer was put in to one suit and submitted to, and the bill substantially amended:—Held, that the amendment of the bill in one suit did not preclude the Master from proceeding with the order of reference.

Under such an order of reference the Master is to report as to the "suit," and therefore is bound to refer both to the original bill and the amended bill (if any) as evidence of the object and scope of the suit.

It is not a ground of appeal that the Court below has reserved the question of costs, which might have been properly disposed of at the hearing.

Two separate suits had been instituted on behalf of an infant; in one of which Jane Moss was the next friend, and this suit was

attached to the court of Knight Bruce, V.C.; and in the other of which J. Dearlove was the next friend, and this suit was attached to the court of the Vice Chancellor of England. On the 19th of December 1848 an order of reference was made by the Vice Chancellor of England in both causes, to inquire which suit was most for the benefit of the infant; and on the same day a decree was made in the suit attached to the court of Knight Bruce, V.C.

On the 6th of January 1849 a demurrer was put in to the first suit (Moss's), and submitted to; the plaintiff obtained the common order to amend, and amended accordingly. The Master declined to proceed with the reference, upon the ground, that a demurrer having been put in to the bill in the first-mentioned cause, after the order of reference of the 19th of December 1848, and such demurrer having been submitted to, and the bill substantially amended, he could not proceed with the order of reference without a further order of the Court.

A very long petition was then presented in both suits, on behalf of the plaintiff, by the next friend in the first suit, that the Master might be directed to proceed with the reference; and the Vice Chancellor of England made an order to that effect, but reserved the question as to the costs of the petition. The plaintiff, by her next friend in the second suit, then presented a petition of appeal to the Lord Chancellor, praying that the last-mentioned order of the Vice Chancellor might be discharged.

Mr. Rolé and *Mr. Selwyn*, in support of the appeal, contended, that the demurrer having been submitted to and the bill amended, the subject-matter of reference no longer existed; that the order of the Vice Chancellor directing the Master to proceed was a new order, and such as he had no jurisdiction to make in two suits, one of which was not attached to his own court, and in which a decree had been made—*Taylor v. Oldham* (1). The order ought to have given to the respondents the costs occasioned by the unnecessary length of the petition.

Mr. Bethell and *Mr. Webster*, contra.—Under the order of reference the Master was bound to look at the amended bill—

Watson v. Life (2). In the case of infants the Court does not hold itself so strictly bound by technicalities as in the case of adults—*Stapilton v. Stapilton* (3) and *Sullivan v. Sullivan* (4). If the Vice Chancellor had jurisdiction to make the original order, he had also authority to direct it to be carried into execution.

NOV. 10.—THE LORD CHANCELLOR.—This case raises a point of pure technicality on a matter relating to the interest of an infant; and of all the cases that can come before the Court that is a matter that the Court is least disposed to listen to. As a protection to the infant, two suits are filed, and it is alleged that they are both for the same purpose, and in such case the practice of the Court is to send it to the Master to inquire, whether they are for the same purpose, and, if they are, then to select which of the two shall go on, in order that the infant's property may not be wasted by double litigation having one object in view. No question appears to be made as to the regularity of the original order of reference; because, although it was not served till after the decree, what passed at the time before the Vice Chancellor precludes the parties from making the objection. I consider, therefore, there was a perfectly regular order of reference to the Master to inquire which of the two suits should proceed; the preliminary inquiry being whether they are for the same purpose. If they are not for the same purpose, then the Court does not interfere, and the parties go on at their own risk. After that reference had been made the next friend of the infant in one suit amends the bill. The Master does not make a certificate or report on the subject; but there is a memorandum furnished by which the Master says, that, under these circumstances, there being a demurrer and an amendment, he was not at liberty to go on.

Now, the first question is, whether that is correct; whether a party amending his bill necessarily withdraws from the Master the inquiry which the Court has directed in both suits. I am very clearly of opinion he does not. The object of the reference

(2) 1 Hall & Twells, 396.

(3) 1 Atk. 6.

(4) 2 Mer. 40.

(1) Jac. 527.

is to know which suit is to go on. The inquiry whether they are for the same purpose is not as to the bill. The bill is only referred to as an evidence of what the suit is for. It contains the statement of the case made on behalf of the infant; whether that is stated in the original bill or in the amended bill, still it remains the bill on which that particular suit is to depend, and the Master has to look into that bill to see what the next friend has alleged in that suit on behalf of the infant, and it would be a most extraordinary thing that that should stay the proceedings in the cause. It has been matter of inquiry; and the answer is, as of course it would be, that it does not stay the proceedings in the cause. It would be staying proceedings by amendment. In many cases you cannot go on a step without amendment. A question is raised by demurrer, shewing a defect for want of parties, and there is a reference to ascertain parties, and the reference is a stay of proceedings in that cause, because you cannot get rid of the objection except by amendment, and according to the doctrine contended for you are not at liberty to amend. I think the Master has fallen into an error in considering the matter of amendment on this demurrer as ousting him of his jurisdiction under the order. Now, that is the whole case. If the Master ought to go on, then all the Vice Chancellor has said is, "You ought to go on."

Then comes the question as to the objection made that though it was quite regular for the Vice Chancellor to make the original order (for that is not disputed), yet it was irregular for him to say "Go on with that order of course." If he is not to do it, who is to do it? The Master says, "I cannot go on, I will not go on; I am not at liberty to go on without the direction of the Court." The petition is merely asking the opinion of the Court whether the Master is right. The Court is of opinion that the Master is wrong. Now, you could not go to the Vice Chancellor Knight Bruce on that, because he did not make the order. It appears to me there was no way of removing the Master's difficulty but by going to the Vice Chancellor who made the order. The Vice Chancellor is the best judge of his own order. I cannot think there is anything in either of these two objections.

NEW SERIES, XIX.—CHANC.

I think, therefore, the order which the Vice Chancellor has made is correct, to the extent of directing the Master to proceed.

Then comes the question, which I certainly do not see any necessity for; the Vice Chancellor having postponed the consideration of the question of costs, all the parties wanted to know was, whether the Master was right or wrong. They were stopped,—they could not help themselves. The Master thought himself precluded from going on, and they could not make him go on without the interposition of the Court. What they came for was simply to know, whether that demurrer and amendment was properly considered by the Master as a suspension of his proceedings under the order. I do not know anything about the long petition in this case, but I know that what the parties really had to ask the Court might have been contained in six lines. The Court had referred the merits in both suits to the Master; the sole question was, whether what had taken place superseded the efficacy of that order. Why the Court should not have disposed of the case at that time, or what the Master's certificate had to do with that long petition, or how it can affect the decision of the Court as to whether the petition was properly or improperly extended to that length, I do not understand. I doubt whether I can interfere with the mode of management of the business of each particular Court. The Court might say "I do not think it convenient to dispose of this petition now, but I will dispose of it in another stage of the cause." The Vice Chancellor has a discretion, and there would be no end of applications here if every adjudication of that sort was matter of appeal. There is no injustice done to the parties, except it be this: that instead of having it decided to-day, it would probably be decided on the next petition day; because the inquiry before the Master is not a thing of protracted delay. It is a matter of that sort which can be disposed of as soon as you look into the two bills. Therefore, I cannot understand that there is any delay or any evil arising from not deciding the question of costs when the matter was before the Court. You might have saved some little expense and some little delay if the Court had said, "I will make this

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order and dispose of the costs now." But the Court said, "I do not see why you extended your petition to that length;" and it thought it proper and more safe to dispose of it hereafter; the counsel will have to refresh their memories, and the Vice Chancellor will have to refresh his by hearing matters again, which he might perhaps have disposed of when it was before him in the first instance. But I cannot interfere on that ground.

I think, therefore, the application here must be refused, with costs.

L.C. }
Jan. 17. } SHALLCROSS v. WEAVER.

Production of Documents.

A bill was filed by the heir-at-law of a testator, against a purchaser from his devisees in trust for sale, to set aside the conveyance on the ground that the purchaser had acted as solicitor to the devisees, and the consideration was inadequate. The defendant, by his answer, insisted that the title was materially defective, and, regard being had to that, the consideration was adequate; and he admitted possession of the title deeds:—Held, that the title deeds must be produced.

This was an application to discharge or vary an order of the Master of the Rolls, whereby it was ordered that certain deeds, documents, abstracts, and writings in the defendant's answer and schedule mentioned relating to lots 3, 4, and 6. of the messuages in the pleadings mentioned should be produced.

This bill was filed to take an account of the real estate of Francis Brookes, who died in November 1836, having by his will devised all his real estates to Wright and Bishop, in trust to sell, and pay certain legacies in the will mentioned which did not exhaust the whole of the fund. The plaintiff claimed the undisposed-of residue as heir-at-law of the testator. The testator's real estate consisted, amongst other things, of a house at Stafford, and other premises which were comprised in lots 3, 4, and 6. This part of the property had been valued, on behalf of the trustees, at the sum of 2,000*l.*; but on being put up to auction in

February 1837, the aggregate amount of the biddings for these three lots reached only to 1,655*l.*, and the property was bought in.

In November 1837, the defendant, Weaver, who had acted as the solicitor to the trustees, and was cognizant of the valuation made previously to the auction, contracted with the trustees for the purchase of these three lots for 1,200*l.*, and they were accordingly conveyed to him.

The bill charged that the purchase-money was grossly inadequate to the value of the property; and that no other solicitor was employed on behalf of the trustees, and it sought a reconveyance from Weaver of the property so purchased by him.

The defendant Weaver, by his answer, stated, that previously to his purchase, it had been discovered, upon examination of the title deeds, that the testator had not a good title to the estate; that the premises were in reality of leasehold tenure, though the testator had taken a conveyance in fee from his grantor; that the defendant was willing to take the title as it was, without putting the vendors to further expense, and that he was unable now to make a marketable title thereto; and he offered to reconvey to the plaintiff, and to account for the rents received by him, upon being repaid his purchase-money and his expenditure in repairs and lasting improvements, with interest. The defendant admitted possession of the title deeds, evidences and writings, and abstracts relating to the premises, and submitted that the plaintiff was not entitled to have copies of or to inspect the same unless upon his undertaking to repay to the defendant his purchase-money and the sum expended on lasting improvements, and that the exposure of the title would be to the injury of the defendant, in case the plaintiff should abandon the suit.

Mr. Wright, in support of the motion, contended, that the plaintiff was not entitled to the production of the earlier title deeds, as they could not afford any evidence of the fraud alleged by the bill. The order for production might have the effect of letting in the real owner of the property, and therefore the plaintiff ought to undertake to repay the defendant his purchase-money and expenditure before he should be allowed to inspect the deeds. In *Dendy*

v. Cross (1) the Master of the Rolls refused to order the production of a deed which the bill sought to impeach.

Mr. R. Palmer and Mr. Elderton, contra.

The LORD CHANCELLOR.—The ground of the claim made by the bill is, that the defendant has not given full value for the property. The defendant sets up by way of defence that the title to the property was defective, and that being taken into consideration, an adequate price was given. This being the issue raised by the bill and answer, I am of opinion that the Master of the Rolls was right in ordering the production of these title deeds.

L.C. }
Jan. 26, 28, 30. } HOWKINS v. JACKSON.

Deed, Construction of — Intention — Mutual Ignorance of Fact.

*Under the will of a testator who died in India, A. was entitled during the life of his wife to the income of property in the course of being transmitted from India, and B. to the capital after her death. By a deed, reciting that certain arrears of interest were due to A. in respect of monies remitted, and that certain sums (specifying them) still remained due to the testator's estate in India, which were carrying interest, and also reciting that B. had paid 2,000*l.* in discharge of A.'s debts; and that A, in consideration thereof, had agreed absolutely to assign to B. all his interest in the estate of the testator, it was witnessed that, in consideration of the premises, A. absolutely assigned to B. (in the most comprehensive terms) all his interest in the monies received or to be received in respect of the testator's estate, with a general release of all claims in respect of the same. At the date of the deed both parties were ignorant of the existence of a sum of 12,000*l.*, part of the assets, which had been received and fraudulently retained by the executor. On a bill by the executors of A, praying a declaration that, upon the true construction of the deed, A.'s interest in the 12,000*l.* did not pass thereby,—Held, reversing the decree of the Court below, that*

(1) 11 Beav. 91.

the mutual ignorance of the existence of this sum was not sufficient ground for limiting the effect of the general words.

Semble—If the bill had been to reform the deed, the circumstances would not have raised an equity for relief.

Robert Gibson the elder, being entitled to considerable real and personal estate both in this country and in India, by his will, dated the 25th of February 1820, bequeathed, among other things, to his trustees therein named, 7,000*l.* 3*l.* per cent. upon trust, to pay the dividends thereof to his daughter, Ann Gibson, during her life, and after her death, in trust, as to the capital, for her child or children, if more than one, equally between them. And the said testator thereby gave all his real and residuary personal estate to his trustees upon trusts for conversion, and out of the proceeds thereof to pay his debts, &c. and to invest the residue; and to stand possessed of one-third part thereof upon the same or the like trusts as were therein-before declared of the 7,000*l.* 3*l.* per cent. consols, bequeathed in favour of his daughter, Ann Gibson, and her children; one other third part upon trusts in favour of his other daughter; and the remaining one-third upon trust for his son Robert Gibson the younger, whom he appointed one of his executors. Ann Gibson, the testator's daughter, shortly after the date of the will married T. Hearsey, who died in January 1822, leaving Ann, his widow, and an only child of the marriage, Ann Gibson Hearsey, him surviving. Robert Gibson, the testator, died in 1823, and his will was proved both in England and in India by Ann Gibson his widow and Robert Gibson the younger only.

In 1830, Ann Hearsey, the widow, intermarried with William Howkins, since deceased, and she afterwards died in January 1839, leaving her husband, W. Howkins, and her only child, Ann Gibson Hearsey, her surviving; and shortly after her death, W. Howkins took out letters of administration to her estate. In February 1839, Ann Gibson Hearsey intermarried with the defendant, Alfred Jackson, and by a settlement, executed previously to that marriage, reciting that Ann G. Hearsey, as the only child of

her mother, was entitled, amongst other things, to a sum of 12,589*l.* 1*s.* 7*d.*, 3*l.* per cent. consolidated bank annuities, or thereabouts, under the will of Robert Gibson, the testator, it was declared that 7,010*l.* consols, part of the above-mentioned sum, should be held upon trust for the benefit of Ann G. Hearsey and her children, and that the residue of the property to which she was entitled under the said will should, after the marriage, become and be the absolute property of Alfred Jackson, the intended husband.

It appeared that at the death of Mrs. Howkins, the testator's daughter, there were considerable parts of the testator's estate outstanding and some arrears of interest thereon were due to W. Howkins as administrator of his late wife. The accounts rendered by the executors of the testator in November 1839, did not distinguish what part of the sums received by them consisted of capital and what of interest; and after the defendant A. Jackson's marriage, it was discovered that a considerable part of the sums which in the marriage settlement had been treated as capital, and had been received as such by A. Jackson, consisted of interest and income accrued in the lifetime of Ann Howkins, and to which W. Howkins was entitled as her administrator.

In 1839, W. Howkins was in considerable pecuniary difficulties, and the defendant, A. Jackson, paid various sums of money in discharge of the debts of W. Howkins, amounting in the whole to 1,547*l.* 16*s.* 2*d.* or thereabouts. By an indenture, dated the 11th of November 1839, and made between W. Howkins of the one part, and Alfred Jackson of the other part, reciting the testator's will and the marriage settlement of A. Jackson, and the error in the accounts rendered by the testator's executors in treating the interest and income as capital; and further reciting that considerable sums (specifying them) were still due to the estate of the said testator in India, which had been and were carrying interest, and that W. Howkins as representing his late wife would be entitled to such interest and income as had accrued during her lifetime; and further reciting that A. Jackson relying that he would be entitled under his marriage settlement to

the whole of the residue of the sum of 12,589*l.* 1*s.* 7*d.*, after deducting the 7,010*l.*, had paid debts of the said W. Howkins to the amount of nearly 2,000*l.*; and reciting that neither W. Howkins or A. Jackson at the time of making the aforesaid settlement had any knowledge that any part of the sum of 12,589*l.* 1*s.* 7*d.* consols consisted of interest or rent, or that any part of the future remittances from India would belong to W. Howkins in right of his late wife; and reciting that the said W. Howkins, taking all the aforesaid circumstances into consideration, and especially that A. Jackson had paid his debts to the amount aforesaid, was minded and desirous, and had proposed and agreed to give up and absolutely assign to the said A. Jackson, for his own use and benefit, all principal monies, rents and interest, rights, claims, and demands whatsoever, to which he, W. Howkins, in his marital right or as such administrator as aforesaid, could set up or be entitled to in respect of the estate and effects of the said testator under or by virtue of his will, and also to give A. Jackson the general release thereafter contained; it was witnessed that in consideration of the premises, and more especially of the 2,000*l.* paid by A. Jackson to or for the use of W. Howkins, W. Howkins assigned to A. Jackson all and every the stocks, funds, bank annuities, rupees, dividends, interest, rents, profits and sum and sums of money, principal and interest, and rights, claims and demands whatsoever, at law and in equity, which he, W. Howkins, as administrator of his late wife, then had or could or might claim, set up, demand, or be in any manner entitled to, from, out of, or upon all or any of the estate and effects of the testator R. Gibson under or by virtue of his said will, and the proceeds, gains, profits, or income thereof, or otherwise produced thereby, or therefrom, or in any manner relative thereto, and particularly in, to, from, out of, or upon all and every the stocks and funds or bank annuities thereinbefore mentioned, and the dividends, interest and annual proceeds thereof, and the debts or monies, principal or interest then remaining due and uncollected in India, England, or elsewhere, and the rents remaining due and uncollected, and

thereafter to be or which ought to be remitted to England, and all or any other the property and estate late of the said testator, R. Gibson, to hold the same to the said A. Jackson, his executors, administrators and assigns, to and for his and their own absolute use and benefit, with the usual powers to sue for and receive the same in the name of W. Howkins. Then followed a covenant against incumbrances and for further assurance and mutual general releases.

In the early part of the year 1842, it was for the first time discovered, that in May 1825, Robert Gibson the younger, as such executor as aforesaid, had received in India a sum of 12,000*l.*, part of a larger sum which was owing to the testator at the time of his death, but which was not included or mentioned in the accounts rendered by him in 1838, but was fraudulently concealed by the said Robert Gibson, and applied to his own use. Upon this discovery, Robert Gibson the younger acknowledged his liability, and an account was come to between the parties by which it appeared that the share of A. Jackson in the said sum amounted to 5,030*l.* 6*s.* 9*d.* capital, and 3,400*l.* for interest thereon, making together 8,430*l.* 6*s.* 9*d.*, of which sum it was agreed that 1,500*l.* was to be paid to A. Jackson immediately, and the remainder was to be secured by a mortgage of certain reversionary property belonging to Robert Gibson the younger. W. Howkins claimed 2,733*l.* 6*s.* 8*d.* (part of the sum of 3,400*l.*) as interest that had accrued due during the lifetime of his late wife.

Certain negotiations for an arrangement of the matters in dispute took place between W. Howkins and the defendant, and a paper writing was drawn up called "Heads of a deed to be indorsed on the assignment from Mr. Howkins to Mr. A. Jackson," dated the 16th of February 1843, and signed by G. S. Drew, as the solicitor of A. Jackson, and by W. Codner, as the agent of W. Howkins. The effect of this writing was an acknowledgment by the defendant A. Jackson, that the assignment of the 11th of November 1839 was merely by way of securing to A. Jackson the sums of money advanced by him to W. Howkins; and that the residue was to be received

by W. Howkins. A deed was afterwards prepared to carry out this arrangement, but eventually A. Jackson refused to execute it.

In June 1846 W. Howkins died, having by his will appointed the plaintiffs his executors. In May 1847 the present bill was filed by the executors of W. Howkins, and after stating the above circumstances, and charging that the deed of the 11th of November 1839, proceeded upon the footing of the accounts rendered by the executor of Robert Gibson the elder in 1839 being accurate and without fraud, and that no part of the interest of the 12,000*l.* was intended to be assigned or in any way affected thereby, it prayed a declaration that the sum of 2,733*l.* 6*s.* 8*d.*, or other the sum due to W. Howkins, for interest in respect of one-third part or share of the 12,000*l.*, was not intended to be assigned, and was not in equity assigned to the defendant A. Jackson by the said indenture, and that the plaintiffs were entitled thereto notwithstanding such indenture, and also that it might be declared that such indenture operated merely as a security for what might be due from W. Howkins to the defendant, and that the defendant was a trustee of the surplus, and for an account and payment.

The defendant, by his answer, insisted that the deed of the 11th of November 1839 was intended to be, and was in fact, an absolute sale to him of all the interest of W. Howkins, in right of his wife, under the will of Robert Gibson the elder.

By decree of Knight Bruce, V.C. it was declared that the share of W. Howkins, in right of his late wife Ann Howkins, in the arrears of interest due in respect of the sum of 12,000*l.*, was not intended to pass, and did not pass, by the indenture of the 11th of November 1839, and that the plaintiffs were entitled in equity to the same.

The defendant appealed from this decree.

Mr. J. Russell and *Mr. Cole*, for the plaintiffs.—At the time of the execution of the deed of the 11th of November 1839 the existence of this sum of 12,000*l.*, in the hands of the executor in India, was unknown to all the parties; and it is clear from the recitals in that deed, that the

parties intended to deal with that part of the estate which they supposed to be the only amount outstanding. In equity the deed will operate upon that fund only upon which the parties intended it should operate; for though the general words may be large enough to include everything, yet the Court will restrain their effect with reference to the intention appearing.

Butcher v. Butcher, 1 New Rep. 113.

Simons v. Johnson, 3 B. & Ad. 175;

s. c. 1 Law J. Rep. (N.S.) K.B. 98.

The Marquis of Exeter v. the Marchioness of Exeter, 3 Myl. & Cr. 321;

s. c. 7 Law J. Rep. (N.S.) Chanc. 240.

Lindo v. Lindo, 1 Beav. 496; s. c. 8

Law J. Rep. (N.S.) Chanc. 284.

Solly v. Forbes, 2 Brod. & B. 38.

Ramsden v. Hylton, 2 Ves. sen. 310.

Mr. Bethell, for the defendant.—The sole object of the bill is to construe the deed; but the decree of the Vice Chancellor has reformed the deed by matter *dehors*. No extrinsic evidence can be admitted to disprove the intention of a general release.

Mr. J. Russell replied.

Jan. 30.—The LORD CHANCELLOR.—If I had collected from the opening of the plaintiffs' case what the nature of the bill was, under which that declaration was to be supported, I should not have called upon the defendant at all. It appears to me that upon this bill it is impossible to support the decree below. The bill does not seek to correct the deed, but it prays a declaration that not only this sum mentioned in the indenture, but all the property comprised in the assignment was only assigned as a security to the defendant for what he might have claimed against the plaintiffs. That case was not made below. The part of the case opened was, that Howkins was entitled to 2,700*l.* as having arisen from the interest of one-third of certain property of the testator, to which income the wife was entitled. But the decree assumes that he is so entitled, and that that interest was not intended to pass by the deed. The complaint is not that the deed was executed under any misapprehension or fraud, or under such circumstances as this Court,

upon a proper case made, would give relief; or that the express terms of the deed are not in the form in which the parties intended they should be. The observations of Lord Eldon may be referred to, that, unless the mistake appears on the face of the deed, as, for instance, the operative part being inconsistent with the recitals, in which case the Court acts without difficulty, the attempt is seldom successful. But that is not the object of this suit. The recitals set forth the intentions of the parties, and the operative part carries out those intentions; and no part of the relief sought is founded upon any attempt to correct the deed or to shew that it ought not to have that effect. It is quite clear what the case is. The transaction was between W. Howkins and Jackson who married the daughter of the wife of the plaintiff's testator. The mother was entitled to the income and the daughter to the capital of property which was to be remitted from the East Indies. When the settlement was made on the defendant Jackson's marriage, there was property remitted, which it appeared was capital and also interest. The interest ought to have been received by Howkins's wife; but when it was remitted to this country the distinction was not made, and it became involved in the settlement of the daughter. Upon that being discovered, a claim was raised that the settlement included property not belonging to the daughter. It appears that Jackson had been in the habit of assisting the family of Howkins, and had claims upon the family for monies advanced to them; and a state of accounts subsisted between them which became matter of arrangement by deed. It was known that property was still outstanding in India, though a great part had been realized; but the fact of the personal representative having received a sum of 12,000*l.* which was not accounted for, but which constituted part of the estate, was not known to either party. The question in this case is, whether that deed did or did not comprise that portion of the testator's property which was in the hands of the personal representative, though it was not known to be so by the parties at the time. Upon this point it is only necessary to look at the deed itself. The deed recites the sums received, and then recites that

William Howkins, taking all the aforesaid things into consideration, and more especially that A. Jackson had, out of his own monies, paid the debts of W. Howkins to the amount of 2,000*l.*, W. Howkins was minded and had agreed to give up to A. Jackson, for his own use, all the stocks, funds, and dividends, principal and interest, rights, claims and demands whatsoever, to which he, W. Howkins, in right of his wife, or as such administrator, could or might claim, &c. by virtue of the said recited will, and to give to A. Jackson the general release hereinafter contained. The deed then assigns to A. Jackson all and every the stocks, &c.—[His Lordship here stated the operative part of the deed.] There cannot be larger words. Not only the recitals, but also the operative words repeat it twice over.

It being known that other property was outstanding, property likely to come from India, with that knowledge, but without the knowledge of the particular fund in question, he passes all his interest in the funds to be derived under the will to A. Jackson. To say that he did not convey all the estate, is to say that no words shall have that effect. It is true that the parties did not know of the 12,000*l.*; it was not known to exist, and, therefore, was not in the contemplation of either party, and so, in one sense, was not intended to be included; but the intention of the parties was to assign all: there was no want of intention, but only a want of knowledge in the parties that the 12,000*l.* existed. What is the meaning of the decree which declares that the property did not pass? If a case was made to take it out of the deed, if the deed was executed under circumstances that gave the party a right to recall it, then it would have been within the province of the Court to give the relief sought. But the bill states no case of this kind, but only that nothing was known of it; and that this occurred through the fraud of the personal representative of Gibson, the testator. Upon a bill framed like this I must look at the deed, to see whether the property passed by the deed; and beyond controversy it did pass. The decree assumes that the Court had jurisdiction under this bill to declare that the case made before the Court did arise,

namely, that the property was not intended to pass; which is only true in an immaterial sense, but the common sense of it is, that the residue was intended to pass, and this sum formed part of the residue. It was intended to pass, and without doubt it did pass; and I apprehend it would be impossible, under these circumstances, to establish a case for relief, even if a proper bill were filed. The only circumstance exciting any doubt is the subsequent correspondence in which the parties seem inclined to give it up; but that is no part of the case. The relief is founded upon a supposed equity, that the parties did not know of the existence of this sum. Without going further into the case, I am clearly of opinion that the Court ought not to make any decree except dismissing the bill, with costs. I am also of opinion that the plaintiffs could not succeed upon a bill filed with a totally different equity.

Decree reversed.

Bill dismissed, with costs.

L.C. { COWELL v. WATTS.
Jan. 29, 30. { WATTS v. COWELL.

Partners—Building Speculation—Parol Agreement—Waiver—Acquiescence.

In May 1843 A. and B. agreed by parol to become jointly interested in certain lands for the purpose of a building speculation. The lease of the lands was taken in B.'s name, and A. and B. continued in joint occupation of the lands till July 1843, when B. assumed exclusive possession and ejected A. From July 1843, B, at his sole labour and expense, carried on operations upon the land by preparing it for building purposes and erecting houses thereon, A. never asserting any title thereto until January 1845, when he claimed an equal interest with B. Upon B. repudiating A.'s title, a bill was filed by A. for specific performance of the parol agreement:—Held, that assuming A.'s title to have been good originally, he had debarred himself from asserting that title by making no claim for eighteen months after his exclusion, during all which time he had permitted B. to carry on the undertaking at his own cost and risk; and the bill was dismissed, with costs, except so far as the same

were increased by the defendant setting up the Statute of Frauds or denying the parol agreement or part performance thereof.

This was an appeal from the decision of Vice Chancellor Knight Bruce, dismissing the bill of the plaintiff Cowell, with costs, except so far as the same had been occasioned by the defendant setting up the Statute of Frauds, or negating the fact of the parol agreement in the pleadings mentioned, or the part performance thereof, and dismissing the cross bill, without costs.

The object of the original bill was to obtain from the defendant, B. Watts, sen., the benefit of a certain partnership agreement entered into by parol between the plaintiff and Watts, sen. in the early part of 1843, to share the profits to be derived from taking certain lands at Brompton, in the county of Middlesex, and preparing them for building purposes, and re-letting the same in parcels at improved ground rents. The defendants, B. Watts, jun. and his children, were made defendants in respect of an alleged interest in the same lands derived through B. Watts, sen.

It appeared that in the spring of 1843, one Bonnin had been in treaty with the trustees of Smith's Charity to take certain lands and tenements upon a building lease for the term of eighty-four years, from June 1843; the buildings to be completed by the 25th of October 1848. B. Watts, sen. then, on behalf of himself and Cowell, entered into a treaty with Bonnin for an under-lease of part of the lands; but Bonnin requiring a deposit of 100*l.* and B. Watts not having that sum, Bonnin drew a promissory note for 100*l.* payable to the order of B. Watts, and handed it over to B. Watts, who immediately procured Cowell to discount it; and thereupon B. Watts gave to Cowell the following document:—"I O U the half of 100*l.* now advanced for Mr. Bonnin. May 17, 1843. Benjamin Watts." B. Watts then handed over the money so received to Bonnin, and on the same 17th of May Bonnin entered into a written agreement with B. Watts to grant him a lease of certain portions of the land which he should acquire from the trustees of Smith's Charity. In the July following, Bonnin obtained a formal agreement from the

trustees of Smith's Charity for a lease of the lands, and on the 19th and 24th of August formal articles of agreement were executed between Bonnin and Watts for a lease to Watts of that portion of the same lands previously agreed upon. Bonnin, who was examined as a witness for the plaintiff, deposed that Watts in his interview with him on the 17th of May 1843, stated that Cowell was to join with him in the undertaking as his partner, and he proposed that the land should be let to both; but that he Bonnin objected to having more than one tenant; and that subsequently B. Watts introduced the plaintiff to him as his partner in the undertaking. There was other evidence to the same effect. It appeared also that Cowell, from May 1843 to July following, was in the habit of turning his horses and cattle on that part of the land which was meadow, and that B. Watts had the exclusive enjoyment of the produce of the garden. In July 1843, B. Watts gave notice to Cowell to remove his cattle from the land, and from that time Cowell was excluded from all enjoyment of the premises, and he never made any claim in respect of his interest in the premises until January 1845, when he applied to B. Watts, through his solicitor, to give a written acknowledgment of his, Cowell's, interest in the undertaking: B. Watts absolutely refused to acknowledge the plaintiff's right. It appeared also that B. Watts from 1843 had prosecuted the undertaking at his sole labour and expense, and that Cowell had never offered in any way to contribute to the same. In August 1845, the plaintiff filed his bill to compel specific performance of the agreement.

Mr. Swanston and *Mr. Metcalfe*, in support of the appeal, contended that there was sufficient part performance to take the case out of the Statute of Frauds, namely, the joint occupation of the lands; and that the partnership agreement might be proved by parol, and that being done, the consequence would be that all the subjects of the partnership must be dealt with according to the contract; secondly, that Watts was the agent of the plaintiff in procuring the lease from Bonnin, and the agency being proved, the plaintiff would have a right to call for the land:—

Dale v. Hamilton, 5 Hare, 369; s. c. on appeal, 2 Phil. 266; 16 Law J. Rep. (n.s.) Chanc. 126, 397.

Lamas v. Bayly, 2 Vern. 627.

Atkins v. Rowe, Mosely, 39.

Forster v. Hale, 5 Ves. 308.

Lake v. Craddock, 3 P. Wms. 158.

Mr. J. Russell and Mr. R. W. E. Forster, in support of the decree, for the defendant, B. Watts, sen., contended that neither was the subject-matter nor were the terms of the partnership clearly defined; and that, even assuming the agreement to have been made, the plaintiff's subsequent conduct amounted to an abandonment, for he performed no part of the duty of a partner, and, when excluded, raised no objection for eighteen months.

Mr. Bacon and Mr. Rolt, for the defendants, B. Watts, jun. and his children.—It would have been impossible to have fixed Cowell with any part of the expenses if the speculation had turned out unsuccessful. The plaintiff, in such a case, must shew acts done inconsistent with the notion of any other agreement than that alleged. The joint occupation of the lands might have been by the permission of the defendant.

Mr. Swanston, in reply.—The terms of the partnership are definite, for an agreement for a joint benefit, without more, is an agreement for an equal benefit.

[The LORD CHANCELLOR.—The question is, whether the Court will disturb the defendant's possession, where the plaintiff has lain by for nearly two years, and allowed the defendant to risk the expenditure of his own money.]

The plaintiff was not intended to be an active partner. The defendant was to carry out the contract, and there was no exclusion until the defendant's refusal to sign the agreement in January 1845.

The LORD CHANCELLOR.—The object of the bill is to obtain from the defendant, B. Watts, an equal share of the property which has been demised to him by Bonnin. The case made is, that the plaintiff and Watts originally agreed to take this property on their joint account on a building speculation. The party, who was the owner of the property, objected to make the lease to the two, and in consequence it

was granted to Watts only. Still, if such a contract existed and was proved, this would make no difference. The land required preparation and the removal of existing buildings. The plaintiff is represented as a monied man, and as having other occupations of his own, and it is alleged that the intention of the parties was, that the defendant was to take the active part in the management of the adventure. The object of the parties was, that the money of the one should be set off against the experience of the other. The plaintiff applied to the defendant, in 1843, for a written acknowledgment of his interest in the undertaking, and the reason given for the defendant's refusal to comply with this request does not at all shew that the defendant then intended to dispute the title of the plaintiff. But the singular part of the transaction is, that after the lease had been granted, the plaintiff made no further application, and this struck me as fatal to the plaintiff's case; for, however the matter might have stood originally, it appears that the plaintiff, at a very early period, ceased to consider himself as a party interested, and the defendant acquiesced in that view of the case. The fact of the plaintiff turning his cattle upon the land might have been done with the permission of the defendant. In the July following, however, the plaintiff's cattle were no longer permitted to be there. No step was taken by the plaintiff to enforce his right to the use of the land, and this is the first act from which the intention of the parties is to be inferred. Until January 1845, the defendant was carrying his operations into effect, not only by his own exertions, but by the advance of his own money, and it appears that he actually mortgaged his own property to the amount of 600*l.* for the sake of carrying on the business. The plaintiff is described as the monied partner, and if he did not interfere actively he ought to have put something into the scale; but he permits the defendant to raise the necessary money upon property of his own for the purpose of finding means to carry on the adventure, and no application was ever made to the plaintiff for this purpose. All this is inconsistent with the idea that the plaintiff had not retired, when you find the defen-

dant borrowing money upon his own credit when he had the resource of a monied partner, who was bound in duty to advance one-half, at least. The plaintiff could not suppose that all these operations were carried on without an expenditure of money. The parties were living in the immediate neighbourhood. Not only does the plaintiff permit the defendant to go on without any intervention on his part, laying out his own money, but he never asserts any right, he submits to the ejection of his cattle and his total exclusion from the joint occupation of the property, and then, when the adventure becomes promising, he asserts his right to the property. Then after asserting his claim in January 1845, he takes no further step till the August following. What else could the defendant have inferred from his conduct, but that he meant entirely to give up his interest in the property and leave the defendant to his own risk? It is much too late after that to say, "now that the speculation is promising I will come for my share." This is a much stronger case than that in *Norway v. Rowe* (1). There the parties had an actual interest in the mine, which at one time was not a promising concern. Some of the adventurers thought they would try an experiment, and they worked the mine for a considerable length of time. When it was found likely to be productive, and these parties had run all the risk and the chance of failure, the other parties, who had not till then interfered, wished to come in and offered to share the expenditure, but Lord Eldon would not allow them to do that. It seems to me that, upon the grounds expressed in the Vice-Chancellor's decree, and in absence of assertion of the right of the plaintiff between July 1843 and January 1845, there is quite sufficient to exclude the plaintiff. It is unnecessary, therefore, to refer to the other parts of the case as to the original title of the plaintiff. Some of the cases referred to have no application, as where an agent who has been instructed to purchase for his principal has purchased for himself. That is a fraud, but there is no fraud here in the way in which the property has got into the hands of the defendant. It was

properly in his hands according to the agreement. I am of opinion that the Vice-Chancellor's order was correct, and the appeal therefore must be dismissed, with costs.

WIGRAM, V.C. }
April 18. } DARBISHIRE v. HOME.

Practice—General Orders—Preliminary Inquiries.

If one of the defendants is out of the jurisdiction, and it is objected by the answers of others that persons not parties to the suit claim an interest in the subject-matter, the Court will not order a reference for preliminary inquiries and accounts, under the 5th General Order of the 9th of May 1839.

This was a motion, on behalf of the plaintiffs, for an order for certain preliminary inquiries and accounts, under the 5th of the General Orders of the 9th of May 1839 (1).

The suit was instituted by *cestuis que trust*, charging the trustees with breaches of trust, whereby the trust funds had been misapplied and wasted, and praying that the trust funds might be made good and new trustees appointed. All the defendants, who were very numerous (amounting to twenty in number), had appeared and answered, except one, who was a joint-purchaser and assignee with another defendant of the share of one of the *cestuis que trust* in the trust funds, and out of the jurisdiction of the Court.

(1) "That in all cases in which it shall appear that certain preliminary accounts and inquiries must be taken and made before the rights and interests of the parties to the cause can be ascertained, or the questions therein arising can be determined, the plaintiff shall be at liberty at any time after the defendants shall have appeared to the bill, to move the Court on notice, that such inquiries and accounts shall be made and taken, and that an order referring it to the Master to make such inquiries and take such accounts shall thereupon be made without prejudice to any question in the cause, if it shall appear to the Court that the same will be beneficial to such, if any, parties to the cause as may not be competent to consent thereto, and that the same is consented to by such, if any, of the defendants as, being competent to consent, have not put in their answer to the bill, and that the same is consented to by, or is proper to be made upon, the statements contained in the answers of such, if any, of the defendants as have answered the bill."—Ord. Can. 137; 8 Law J. Rep. (N.S.) Chanc. 273.

(1) 19 Ves. 144.

By some of the answers, it was objected that other persons than the parties to the suit claimed an interest in the funds in question, and ought to be made parties. This objection had not been set down by the plaintiffs for argument under the 39th Order of August 1841.

In support of the motion, it was contended, that it was in the discretion of the Court to grant it, if satisfied that the case came within the terms of the General Order. The great number of defendants was a reason for granting a reference, which might save the expense and delay of going to a hearing. If the right of the plaintiffs to institute the suit was not admitted, their title to the funds in question either under the will or the settlement mentioned in the pleadings was admitted by all the defendants who had appeared and answered. Therefore the only relief, if any, which could be had at the hearing, was such as the bill prayed. It was not necessary for the purposes of the present motion that the plaintiffs should be entitled to the whole of the relief prayed; if they were entitled to any relief, it would be sufficient.

Against the motion, it was contended that the Court would not make the order where, as in the present case, the substantial equity of the plaintiffs was denied by answer—*Belcher v. Whitmore* (2); where the defendants objected that other persons were necessary parties—*Logan v. Baines* (3); or where some of the defendants were out of the jurisdiction of the Court—*Barrett v. Buck* (4), *Meinertzhagen v. Davis* (5).

Mr. Wood and *Mr. Southgate*, for the plaintiffs.

Mr. Teed, *Mr. Hallett*, *Mr. Sandys*, *Mr. W. Morris* and *Mr. Hoare* were amongst the counsel who appeared for the several defendants.

WIGRAM, V.C., on the authority of *Barrett v. Buck* and *Meinertzhagen v. Davis*, refused the motion, with costs.

M.R. }
March 7 ; } PAYNE v. LITTLE.
May 2. }

Master—Special Order—Amendments—
67th, 68th, 69th General Orders of May 1845.

Special orders to amend must be obtained upon the affidavit of the plaintiff and the solicitor.

On obtaining a special order to amend, it is not necessary that the affidavit mentioned in the 68th General Order of May 1845, should state all the amendments to be made in the bill.

This was a motion by C. Greville to discharge the Master's order, dated the 5th of February, giving the plaintiff leave, under the 68th General Order of May 1845 (1), to amend the bill as she might be advised before the 7th of February; and that the amendments made in pursuance of the order might be taken off the file.

The bill was filed to obtain an account of the estate of William Preest, deceased, and it prayed a declaration that J. Little and C. Greville were personally liable to pay to the plaintiff the arrears of an annuity of 400*l.* a year, and asking that they might invest sufficient money in the funds to secure the future payments.

The bill was filed on the 12th of October 1848; and on the 5th of March 1849 the defendant C. Greville put in his answer to the original bill.

On the 29th of May 1849 the plaintiff obtained the first order to amend her bill, which was amended on the 11th of June. C. Greville put in his answer to the amended bill on the 20th of August. In consequence of the facts disclosed by the several answers, counsel advised that further amendments were necessary. Some time was occupied in making these amendments, but on the 5th of February 1850 the Master gave the plaintiff leave to amend her bill as she might be advised. In pursuance of this order, the plaintiff made sixteen amendments in the body of the bill, together with the corresponding amendments in the interrogating part, and amended the defendant's office copy of the bill.

(1) Ord. Can. 309; 14 Law J. Rep. (N.S.) Chanc. 290.

(2) 7 Beav. 245; s. c. 13 Law J. Rep. (N.S.) Chanc. 247.

(3) 10 Sim. 604.

(4) 2 Hare, 520.

(5) 10 Sim. 289.

Mr. Bagshawe and *Mr. T. S. Clarke*, in support of the motion.—The affidavit upon which the order was made did not state that the amendments had been settled, approved and signed by counsel, in compliance with the 67th Order of May 1845: it was also made by the solicitor alone, and not by the plaintiff and her solicitor; neither did it shew that the amendments were material, or that they could not with reasonable diligence have been sooner introduced into the bill. Upon these points the affidavit was silent, and did not state circumstances. The Master, therefore, had never exercised his judgment upon the case—*Christ's Hospital v. Grain-ger* (2), *Phillips v. Goding* (3), *The Attorney General v. the Fishmongers Company* (4). The defendant's affidavit shews that the matter of the amendments must have been known so far back as 1849.

Mr. Turner and *Mr. Selwyn*, contra.—This case falls within the 68th and 69th General Orders, which are within the discretion of the Master, whose attention was drawn to the amendments and to the 69th Order. The Master heard the solicitor, and through him the nature of these amendments, and no affidavit has been made to the contrary.

THE MASTER OF THE ROLLS.—The plaintiff seems to have looked at the 67th Order and not at the 68th and 69th. I am concerned to see a stoppage of the proceedings by such an application which creates expense only. I do not think that it is the rule to have an affidavit, stating all the material amendments: if they were produced, they were before the Master and of course heard, and were I to lay down a rule that a party must swear to them all, it would create a monstrous expense; but I cannot withdraw that part of the obligation imposed by the Order which requires it to be stated by the plaintiff and her solicitor that the amendments were material. There may be delay by a plaintiff as well as by a defendant. I must, therefore, discharge the Master's order; but I shall allow the

question as to taking the amendments off the file to stand over until the Master has decided what amendments are to be made, and I shall give no costs.

Upon the 25th of March a further application to amend was made to the Master; it was attended on both sides by counsel, when the order made was, that "upon the application of the plaintiff, and reading an affidavit of the plaintiff and of G. T. Tweed and G. W. Watson, and also the draft amended bill, and hearing what was alleged by the counsel and solicitors of the respective parties, I do order that the plaintiff be at liberty to amend her bill as she may be advised," &c.

Mr. Bagshawe and *Mr. T. S. Clarke* now moved to discharge this order for irregularity, on the ground that it was not shewn that the plaintiff had used reasonable diligence in preparing the amendments, and because only five out of sixteen amendments made to the bill were stated or referred to in the affidavit filed in support of the application before the Master, when, as insisted, the 68th Order of May 1845 required all the amendments to be stated in the affidavit.

Mr. Turner and *Mr. Selwyn* opposed the application.

Mr. Bagshawe, in reply.

THE MASTER OF THE ROLLS.—The amendments arose out of a banker's pass book, which was discovered in July, without any want of diligence. As soon as it was discovered an attempt was made to take advantage of it, but it failed from the illness of counsel: that is no excuse; the other party is not to be delayed on that ground. Was this delay, then, such that it amounted to a want of reasonable diligence? It is said that reasonable diligence has not been proved; but I cannot come to that conclusion, and the order does not fail on that ground. It is then said that the Master did not take the amendments into his consideration; but the amendments were stated to him, and in fact had been placed on the file, and the defendant's office copy amended. In this state the parties went before the Master, and it was then agreed that two subjects of these amendments might have

(2) 1 Phil. 634; s. c. 15 Law J. Rep. (N.S.) Chanc. 145.

(3) 1 Hare, 40; s. c. 11 Law J. Rep. (N.S.) Chanc. 90.

(4) 4 Myl. & Cr. 1.

been introduced earlier, and that the other eleven amendments had not been mentioned in the affidavit; but it is not required that all the amendments should be proved at full length. It was also said that the eleven amendments were not consequential on those mentioned in the affidavit. They must, however, be in some way connected. The counsel for the defendants knew what they were, and stated objections; but the Master thought it unnecessary to attach any weight to them. I must, therefore, refuse this application, with costs.

WIGRAM, V.C. }
Feb. 20, 27; } BOREHAM v. BIGNALL.
March 12. }

Will—Construction—Annuity to Wife after Insolvency of Husband—Second Wife.

A testator directed trustees to pay an annuity to his nephew for life, without anticipation, &c. or until bankruptcy or insolvency; and in case of bankruptcy or insolvency to pay the same to his wife for the personal support of herself and him and his children, during the life of him and her and the survivor, with power, in case of alienation, &c. by them or either of them, to the trustees to withhold payment of the annuity, or to apply it towards the support of their children. The nephew took the benefit of the Insolvent Debtors Act in the lifetime of his first wife, living at the testator's decease, and afterwards married a second wife:—Held, that the second wife took no interest in the annuity, and that upon the death of his first wife, their children became entitled in equal shares to the annuity during his life, and that upon his decease the fund upon which it was secured fell into the residue of the testator's estate.

At the hearing for further directions a question was raised whether the widow of James Boreham, in the pleadings mentioned, took, during her life, an annuity of 100*l.*, bequeathed by the following clause in the testator's will:—"And as to the residue of my stocks or funds and other sufficient parts of my property, I do hereby direct my trustees and executors to set apart and

appropriate a sufficient part thereof, in trust to answer and pay a further annuity or clear yearly sum of 100*l.* into the proper hands of my said nephew James Boreham, from the time of my decease, for his personal support, in such manner as to them shall seem best, and so as that the same may not be anticipated, aliened, charged, or affected in anywise howsoever, and the same to be and continue payable half-yearly or quarterly during his natural life, or until he shall become a bankrupt or insolvent; and from and after his decease or in case he shall become bankrupt or insolvent, then I will and declare that the same annuity or yearly sum shall be paid and payable to the wife of him, the said James Boreham, as some provision for the personal support of herself and of her husband and his children, as an inalienable provision during the life of the said James Boreham and of his wife, and of the survivor of them; and in case they or either of them shall attempt to alienate, charge, or incumber the said last-mentioned provision or annuity, it shall be in the power of my said trustees or executors to withhold the payment thereof altogether, or to apply the same for or towards the support of their children in such manner as they shall think fit."

The testator also gave the rents and profits of certain real estates, after the death of his widow, to his nephew for life, "as an inalienable provision for him and his family."

The testator died in 1814 and his widow in 1834. At the date of the will James was married to his first wife, and after the testator's death, and in her lifetime, he twice applied for and obtained the benefit of the Insolvent Debtors Act. His first wife died in 1838, leaving three children, born after the testator's death, surviving. James afterwards married a second wife, and died without children by her.

The Solicitor General and Mr. Moore, appeared for the plaintiffs.

Mr. Roundell Palmer and Mr. Pemberton, for the heir-at-law and next-of-kin of the testator.

Mr. Walker and Mr. Campbell, for the widow of James Boreham; and

Mr. Wood, Mr. Kenyon Parker, Mr. Bacon, Mr. Terrell, Mr. Bagshawe, Mr.

Willcock, Mr. Follett, and Mr. Cankrien, for other parties.

On behalf of the heir-at-law and next-of-kin of the testator, it was argued that the annuity, in the event which happened, was payable only to the first wife of James during her life, and not to his second wife—*Garratt v. Niblock* (1) and 1 *Jarman on Wills*, 285; and that upon the insolvency of James it became payable during his life for the benefit of his children by her; and that upon his death (the residuary gift over being held void for remoteness) it fell into the residue, and passed to the testator's next-of-kin.

For the widow of James it was contended that the word "wife" meant any wife whom he might at any time marry. The case of *Peppin v. Bickford* (2) was cited, and relied upon as an authority for the form of settlement required in the present case.

March 12.—WIGRAM, V.C., after stating the above facts and reading the clause in the will, said—If this question were addressed to a person not bound by legal rules of construction, and such person were told that James Boreham had no children by his first wife, and that he left a family by his second wife surviving him, he would have a difficulty in admitting that effect would be given to the intention of the testator, if the widow of James were not to enjoy the annuity for her life, and that the children of James by that wife were not the objects of the testator's bounty when he speaks of the children of James. And, yet, to this length the argument against the widow must go.

The question, however, which I have to consider is, whether the will gives it to her or not. In considering the construction of the will, I am compelled to consider it, not only with reference to the events which actually happened, but to those which might have happened and are expressly provided for by the will. To this extent, at least, I must go, and if the construction which would give the annuity to the widow of James is incompatible with the construction which such other events required, I

must, however satisfied I may be that I am disappointing the real intentions of the testator by doing so, hold that the case of the second marriage of James is *casus omissus* from the will, and, consequently, that the widow of James has no interest in the annuity.

Now, the will directs that in case of the insolvency of James, the annuity shall be paid to his wife during the joint lives of James and his wife, and the survivor of them, for the purposes mentioned in the will. It further provides, that if they or either of them shall attempt to alienate the annuity, it shall be in the power of the trustees to withhold the annuity altogether, or to apply it for the support of the children. Now, without relying on the insolvency of James as an attempt to alienate, which in law it is, suppose James to have attempted to alienate the annuity otherwise than by insolvency, the trustees would in that case have had power to apply the annuity for the benefit of the children of James by his first wife, but not for the benefit of that wife. How, then, could the second marriage of James revive the annuity for the benefit of the second wife? It may be said that according to the words of the will, the annuity, in case of alienation by insolvency, was to go to the wife of James. But I must either consider this as qualified by the power immediately afterwards given to the trustees, or hold that the testator, in the clause giving such power to the trustees, contemplated alienation, or attempt at alienation by some act other than insolvency, which, in ordinary acceptance, is not looked upon as alienation by the act of the party. Unfortunately, I am bound to adopt a construction of the will which would have met the case of alienation by James otherwise than by insolvency. The word "their," used in describing the children, for whose support the trustees have power to apply the annuity in the events mentioned in the will, is conclusive, as shewing that one wife only of James was in the contemplation of the testator, and that that wife must have been the one living at the date of the will. This criticism upon the word "their," unfortunately confirms the conclusion which the general argument upon the will appears to me to bear. I have never before seen a case in which I

(1) 1 Russ. & Myl. 629.

(2) 3 Ves. 570.

am more satisfied than I am in this case that the real intention of the testator, which certainly was to secure some provision for James and his family, (which word "family" would include his wife and children by any wife), is disappointed by the omission of the testator to provide for the case of a second marriage by James. It is remarkable that the testator in the present case provides for the children of James out of the residue of his (the testator's) property; but this provision is, I am afraid, too remote, not being given to them until they reach twenty-five years of age.

The case of *Peppin v. Bickford*, which was cited in the argument, does not help this case. Independently of the circumstance that in that case the legatee was unmarried at the date of the will and of the testator's death, the gift in tail after the death of the nephew and his wife, might have been disappointed if the word "wife" had been confined to the first wife only.

By the decree it was declared that the defendant, the widow of James Boreham deceased, was not entitled to or interested in the annuity of 100*l.* given by the will of the testator to the wife of the said James Boreham, and that his three children became entitled in equal shares to the annuity upon the death of his first wife, and thenceforward during his life, and that upon his decease the fund directed to be set apart to secure the annuity fell into the testator's residuary estate. The costs of all parties to come out of the fund.

V.C. }
June 4, 20. } ROBINSON v. HEDGER.

Insolvency—Priority—Judgment.

An insolvent within a year previous to his insolvency executed a mortgage upon certain property, with a power of sale for the mortgagee to pay himself off, and the residue to go to the insolvent, his appointees and assigns. The insolvent had subsequently executed a warrant of attorney to the plaintiff, on which judgment was entered up, and he was taken in execution. He then presented his petition under the Insolvent Act, and before

his discharge the mortgagee sold under his power of sale:—Held, that the plaintiff was entitled to priority in respect of his judgment over the other creditors of the insolvent.

In this case a gentleman named Lister became entitled upon attaining the age of twenty-one, in October 1846, to a remainder in fee in certain property called Burwell Park. On the 22nd of May in the following year 1847, he barred the entail in the property, and on the 12th of February 1848 he mortgaged his remainder in fee to the defendant Hedger, to secure 100*l.* and interest.

By the mortgage deed a power of sale was given to Hedger, the proceeds to be applied in payment of the principal, interest, and costs, and the residue to be upon trust for Mr. Lister, his heirs, appointees, and assigns. On the 2nd of March 1848 Mr. Lister having become indebted to the plaintiff Robinson in 400*l.*, secured that sum to him by a warrant of attorney and judgment. The judgment was entered up on the 5th of March, and registered on the 7th of March 1848.

In June 1848 Mr. Lister was taken in execution upon this judgment, and on the 12th of September following he presented his petition to the Insolvent Debtors Court for protection, under the act of the 7 & 8 Vict. c. 96, and was discharged in February 1849. Previously to his discharge, on the 12th of January 1849, Lister, the mortgagee, executed his power of sale under the mortgage deed, and this bill was filed by Robinson, the judgment creditor, against Hedger, the mortgagee, and against the assignees of Lister, claiming priority in respect of the judgment over the other creditors in the insolvency.

The question for the opinion of the Court depended upon the construction of the statutes 1 & 2 Vict. c. 110. ss. 13. and 61. (1), and 7 & 8 Vict. c. 96. s. 21. (2), and

(1) 1 & 2 Vict. c. 110. s. 13.—“And be it enacted, That a judgment already entered up or to be hereafter entered up against any person in any of Her Majesty's superior courts at Westminster shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents, and hereditaments (including lands and hereditaments of copy-

(2) See next page.

the argument relied upon by the defendant was that by the 61st section of the former act, and the 21st section of the latter act the charge in equity given by the 13th section of the first act was negatived,

hold or customary tenure) of or to which such person shall at the time of entering up such judgment, or at any time afterwards, be seised, possessed, or entitled for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder, or expectancy, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might without the assent of any other person exercise for his own benefit, and shall be binding as against the person against whom judgment shall be so entered up, and against all persons claiming under him after such judgment, and shall also be binding as against the issue of his body and all other persons whom he might without the assent of any other person cut off and debar from any remainder, reversion, or other interest in or out of any of the said lands, tenements, rectories, advowsons, tithes, rents, and hereditaments; and that every judgment creditor shall have such and the same remedies in a court of equity against the hereditaments so charged by virtue of this act, or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been so entered up had power to charge the same hereditaments, and had by writing under his hand agreed to charge the same with the amount of such judgment debt and interest thereon: Provided that no judgment creditor shall be entitled to proceed in equity to obtain the benefit of such charge until after the expiration of one year from the time of entering up such judgment, or in cases of judgments already entered up, or to be entered up before the time appointed for the commencement of this act, until after the expiration of one year from the time appointed for the commencement of this act, nor shall such charge operate to give the judgment creditor any preference in case of the bankruptcy of the person against whom judgment shall have been entered up, unless such judgment shall have been entered up one year at least before the bankruptcy: Provided also, that as regards purchasers, mortgagees, or creditors, who shall have become such before the time appointed for the commencement of this act, such judgment shall not affect lands, tenements, or hereditaments, otherwise than as the same would have been affected by such judgment if this act had not passed: Provided also, that nothing herein contained shall be deemed or taken to alter or affect any doctrine of courts of equity whereby protection is given to purchasers for valuable consideration without notice."

1 & 2 Vict. c. 110. s. 61.—"And be it further enacted, That in all cases where any prisoner whose estate shall have been vested in the said provisional assignee under this act shall have executed any warrant of attorney to confess judgment, or shall have given any *cognovit actionem*, or bill of sale, whether for a valuable consideration or otherwise, no person shall, after the commencement of the imprisonment of such prisoner, avail himself or herself of any execu-

inasmuch as the charge arose on a judgment.

Mr. Stuart and *Mr. Martindale* appeared for the plaintiff.

Mr. Bethell and *Mr. Beales*, for the assignees, and

Mr. Murray, for the defendant Hedger.

June 20.—The VICE CHANCELLOR.—In this case I have read over all the documents connected with this question, for the purpose of ascertaining the machinery which was used, and my opinion is, that having regard to the provisions of the 1 & 2 Vict. c. 110. the act for regulating insolvency, and the 7 & 8 Vict. c. 96, the case must be decided entirely upon the law of insolvency created under the former act. It does not appear to me that anything contained in the 7 & 8 Vict. c. 96. can be considered as overruling the plain construction of the 1 & 2 Vict. c. 110. The facts are simply these: that Mr. Lister having a remainder in tail, which was capable of being barred, did, by a conveyance in 1847, upon which nothing turns, and by another deed in 1848 which created a charge

tion issued, or to be issued upon any judgment obtained or to be obtained upon such warrant of attorney or *cognovit actionem*, or of such bill of sale, either by seizure and sale of the property of such prisoner, or any part thereof, or by sale of such property theretofore seized, or any part thereof, but that any person or persons to whom any sum or sums of money shall be due in respect of any such warrant of attorney or *cognovit actionem*, or of such bill of sale, shall and may be a creditor or creditors for the same under this Act."

(2) 7 & 8 Vict. c. 96. s. 21.—"That in all cases where any petitioner for protection from process, whose estate shall have been vested in an assignee or assignees under the provisions of the said recited act, and of this act, or of either of them, shall have executed any warrant of attorney to confess judgment, or shall have given any *cognovit actionem* or bill of sale, whether for a valuable consideration or otherwise, no person shall after the filing of the petition of such petitioner, avail himself of any execution issued or to be issued upon any judgment obtained, or to be obtained upon such warrant of attorney or *cognovit actionem*, either by seizure and sale of the property of such petitioner or any part thereof, or by sale of such property theretofore seized, or any part thereof, or avail himself of such bill of sale, but that any person or persons to whom any sum or sums of money shall be due in respect of any such warrant of attorney or *cognovit actionem*, or of such bill of sale, shall and may be a creditor or creditors for the same under the said recited act and this act."

in favour of Hedger, convey the remainder in fee to Hedger, so as to give him the legal estate, in trust to sell and pay himself what should be due to him, and the residue was to go to Lister, his heirs, appointees, and assigns. When this case was before me last, I expressed an opinion that it might be difficult to say whether the charge under the Insolvent Act might not operate as an appointment. That, however, it is unnecessary to decide, because my opinion is that when once the conveyance was made to Hedger, and the judgment entered up on a warrant of attorney, a redeemable interest at least was created in Lister or other persons claiming under him, and therefore it is a mere matter of course that the plaintiff should have what he asks for, and that the residue should go to the assignees in insolvency.

V.C. }
June 1, 4. } ROBSON v. LORD BROUGHAM.

Pleading—Exception—Impertinence.

Plaintiffs filed a bill against executors for the administration of their testator's estate and for payment of a debt alleged to be due to them from the estate of the deceased. The interrogatories were framed with great minuteness, requiring the executors to set forth all the particulars relating to the testamentary property, and whether the defendants, or one and which of them, do or does not refuse to pay the plaintiffs the amount of their demand, or some and what part thereof, and why. One of the executors, in answer to the interrogatories, stated various facts relating to previous money transactions between himself and the plaintiffs as a reason for doubting the accuracy of the plaintiffs' claim. Exceptions were taken to the answer for impertinence, and allowed by the Master. Upon exceptions to the Master's report, the Court held that the defendant was justified, in answer to the pointed form of the interrogatories, in setting forth what he had done; and the exceptions to the Master's report were allowed.

This matter came before the Court upon exceptions to the report of the Master, who had allowed exceptions to the answer of
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Lord Brougham, for impertinence. The bill was filed by John Robson the elder and John Robson the younger, who were coachmakers, in South Audley Street, against Lord Brougham and the Right Hon. Edward Ellice, executors of the late Lord Melbourne. The bill stated that, for many years previous to the month of June 1848, Lord Melbourne had been in the habit of dealing with the plaintiffs for carriages and harness, and that in June 1848 the said Lord Melbourne contracted with the plaintiffs for the hire of three carriages, built in the best and most expensive style, expressly for his use, and fitted up for him, and thereupon an agreement was executed by the plaintiffs and Lord Melbourne, dated the 10th of June 1848, by which the said John Robson & Co., for themselves, their heirs, administrators and assigns, covenanted and agreed to furnish Lord Viscount Melbourne with a town chariot, travelling chariot, and barouche, on job, for seven years next ensuing; and further, the said John Robson & Co. agreed to do all the necessary repairs, find new wheels when wanted, &c., for the sum of 241*l.* 10*s.* per annum; and that the said Lord Viscount Melbourne, for himself, his heirs, executors or assigns covenanted and agreed to take the said carriages for the term of seven years on job, as therein specified, paying for each year in succession in advance the sum of 241*l.* 10*s.*, and all taxes to which the said carriages might be liable, and the charges for repairing damages done by accident, broken glasses, oiling of wheels, &c., the said carriages to be and remain the property of John Robson & Co., and delivered up to them at the expiration of the term of seven years as agreed. That in pursuance of the said agreement the plaintiffs furnished the three carriages, which were kept and used by Lord Melbourne on the footing of the said agreement up to the time of his decease, and Lord Melbourne paid the plaintiffs, in the month of July 1848, the sum of 241*l.* 10*s.* for the hire of the carriages for the first year. That Lord Melbourne also contracted with the plaintiffs for the hire of harness for the said carriages for the term of seven years, at the annual sum of twenty guineas, and that the harness was supplied in pursuance of such

agreement. That during the year 1848 the plaintiffs painted and repaired the said three carriages, free of expense in all particulars provided for by the said agreement; that during the same year the plaintiffs made divers fittings for the said carriages not included in the said agreement, and did other work and labour for Lord Melbourne to the amount of 53*l.* 18*s.* 6*d.*, in which amount the said Lord Melbourne was indebted to the plaintiffs at the time of his death, which took place in 1848; that the said Lord Melbourne, by his will, dated the 31st of January 1843, amongst other things, directed all his just debts to be paid, and appointed the defendants his executors; that on the 10th of June 1849 there became due to the plaintiffs, under the said agreement, for the hire of the said three carriages, the sum of 241*l.* 10*s.* and for the said harness the sum of 21*l.*, and also the sum of 53*l.* 18*s.* 6*d.* for repairs, &c., making together the sum of 316*l.* 8*s.* 6*d.*, which said sum the plaintiffs had repeatedly applied for to the defendants, but which the defendants had declined to pay them; that the plaintiffs had also applied to Mr. Cookney, the defendants' solicitor, for payment of the amount, when an offer of 262*l.* 10*s.* was made to the plaintiffs, but which offer the plaintiffs refused. The bill prayed that an account might be taken of what was owing to the plaintiffs in respect of their said demand, and that the estate of the said Lord Melbourne might be duly administered, and that the demand of the plaintiffs, and all other the unpaid debts of Lord Melbourne might be paid and satisfied, together with the costs of this suit.

The interrogatories to the bill set forth at great length the correspondence between the parties and various requests for payment by the plaintiffs and refusals by the defendants, and the last interrogatory was in the following words:—"Whether the said defendants, or one, and which of them, do or does not refuse to pay to your orators the amount of their said demand, or some and what part thereof, *and why*; and whether the said defendants, or one, and which of them, do or does not allege, and whether it is the fact that the personal estate and effects of the said Lord Viscount Melbourne were small and inconsiderable,

and whether or not insufficient to pay and satisfy his just debts and funeral and testamentary expenses, or how otherwise: and that unless they shall admit assets of the said Lord Viscount Melbourne come to their hands or use, sufficient to answer the demands of your orators, the said defendants may set forth and discover a full, true, and just inventory and account of all and singular the personal estate and effects which at the time of his death the said Lord Viscount Melbourne was possessed of, interested in, or entitled to, and all particulars whereof the same consisted, and the quantities and qualities, full, true, and utmost value thereof, and every part thereof, and the amount or value thereof in the whole, and how and what parts or part of such particulars have or has, and when, been possessed and received by or come to the hands of them, the said defendants, or either, and which of them, or any other persons or person, and whom by name, by their, or either, and which of their order, or for their, or either, and which of their use, and how and in what manner, and when and where, and by and to whom, and for how much the same and every part thereof hath or had been sold or disposed of; and what part or parts thereof, and to what value and amount, now is or are undisposed of, and what hath become of such personal estate, and every part thereof; and whether any and what part or parts of the personal estate and effects of the said Lord Viscount Melbourne is or are now remaining outstanding and to be received, and from whom, and what is the amount thereof, and why the same and every part thereof, hath been permitted to remain outstanding and unreceived; and that the said defendants may also set forth and discover a full, true, and particular account of all debts or debt, of what nature or kind soever, which were or was due from the said Lord Viscount Melbourne at the time of his death, and to whom, and for what and on what security or securities, if any, the same were or was respectively due; and whether any and what sums or sum of money have or has been since paid for or towards the discharge of such debts, or any or either, and which of them, and when and by whom, and to whom, and for what in particular; and whether any and

what sums or sum of money do or doth now remain unpaid on account of such debts, or any or either, and which of them. Whether the said defendants, or one, and which of them, had or hath not now, or had not lately, or at some time or times, and when, in their, or one, and which of their possession, custody, or power, and whether or not in the possession, custody, or power of their, or one and which of their solicitors or agents, or some other persons or person on their, or one, and which of their behalf, and whom by name, divers and what, or some, and what deeds, books of account, accounts, bills of exchange, promissory notes, and other and what negotiable instruments, bonds, receipts, vouchers, invoices, bills of parcels, letters, notes, drafts of deeds, bills of costs, cases for the opinion of counsel, opinions of counsel, memorandums, documents, papers and writings, or some, or one, and which of such particulars; and whether or not also divers and what, or some and what copies or copy of, or extracts or extract from, some, or one, and which of such particulars relating to, or mentioning, or referring to the several matters hereinbefore stated and charged, or some, or one, and which of them, and whether thereby, or by some, or one, and which of them, if the same were produced, the truth of such matters, or some, or one, and which of them would not appear. And that the said defendants may set forth a full, true, and particular list and schedule of all and every the aforesaid particulars, and produce and leave such of them as are or is now in their or either of their possession, custody, or power, or in the possession, custody, or power of their, or either of their solicitors or agents, solicitor or agent, or any other persons or person on their, or either of their behalf, with the proper officer or officers of this honourable court for the usual purposes, and may set forth what has become of such of the aforesaid particulars as at any time were or was, but are or is not now in their, or either, and which of their possession, custody, or power, or of their, or either, and which of their solicitors or agents, solicitor or agent, or any other persons or person on their or either, and which of their behalf, and why, when, and to whom, and for

what reason, they, the said defendants, or either, and which of them, parted with the same respectively."

To this bill the defendants put in their joint answer, stating their belief from the papers found after Lord Melbourne's death, that he had for many years previous to June 1848 been in the habit of hiring carriages on job and purchasing harness from the plaintiffs, and that the longest period for which such contracts were made was for six years; that they had found a receipt dated the 10th of June 1846, purporting to be for the fourth year's hire of two carriages of a renewed job of six years; that such last-mentioned contract would not have expired until the year 1849, and that the said Lord Melbourne, in the year 1846, had entered into a contract for a third carriage, and that the yearly sums payable upon the said two contracts amounted to 241*l.* 10*s.*; that the defendants had found among the papers of the said Lord Melbourne an unstamped paper bearing the signature of J. Robson & Co., but not signed by Lord Melbourne, and which was in the same terms as that alleged by the plaintiffs to have been executed by Lord Melbourne on the 10th of June 1848, but that in the said paper the word "seven" occurred three times, and was inserted in a handwriting different from that in which the body of the paper was written, but apparently in the same handwriting as that in which the signature "J. Robson & Co." was written; that they had also found amongst the said Lord Melbourne's papers a bill purporting to be dated in June 1848, and to have been owing to the plaintiffs for coach-making business, commencing June 1847, and to which bill a receipt was annexed, the last item of which was "the first year's hire of town chariot, travelling chariot, and barouche, on renewed job for seven years certain from date, at the annual premium of 241*l.* 10*s.*, as per agreement, the present harness being made over to Robson & Co., they agreeing to repair the harness and keep it in order, and furnish new harness when requisite for the same term as the three carriages, at the annual premium of twenty guineas, as per agreement." The defendants further stated, that, regard being had to the fact that in the said month of June

1848 the said Viscount was in the seventieth year of his age, and was and had for some time before been in very infirm health, having had two severe paralytic strokes, as was well known to the plaintiffs, and regard being had to the fact, as the defendants well knew, that the said Viscount had thought very badly of his own chance of life, and regard being had to the fact that the said Viscount had previously to 1848 hired carriages on a contract for six years only, and had a contract which would not expire by effluxion of time till April 1849, the defendants thought it very improbable that the said Viscount did in June 1848 either intend to contract or did in fact contract for the hire of three carriages for seven years certain, without obtaining any diminution of charge, and without providing for new carriages, built for him expressly, or for the said contract being put an end to either in the event of his increasing infirmity or of his death, on payment of some penalty, as was usual in contracts of this nature. And under the circumstances aforesaid the defendants considered that there was great suspicion attached to the aforesaid transaction, and were under the impression and belief that, as executors and trustees under the will of the said Viscount, under which they were trustees for unborn persons, and for an infant of the said testator, they were bound to investigate the said claim with the utmost care, the more especially as the defendant Henry Lord Brougham and Vaux, had reasons, from his own personal experience, to doubt the accuracy in business matters of the said firm of John Robson & Co. And the defendant, Henry Lord Brougham and Vaux, for himself, stated that previously to December 1835 he had dealings with the said firm of John Robson & Co. as to the hire of carriages, on job and otherwise, in respect to which he paid the said firm a sum of 250*l.* in or about the month of June 1835, and while he was sitting in the House of Lords hearing appeals, and for which he took no receipt; and that in the month of December 1835 the said firm demanded payment of him of a debt of 600*l.* and upwards in respect of the said transaction, and sent in an account of such claim, but without giving credit therein for the said sum of 250*l.* so paid in the

preceding month of June, and that on or about the 23rd of December 1835 he, the said Lord Brougham, had an interview on the subject of such claim at his house in Berkeley Square with one of the said plaintiffs, in the presence of William Brougham, Esq. one of the Masters of this court, and a brother of the defendant, and in the course of the said interview the defendant observed to the said last-mentioned plaintiff that no credit was given in the said account for the said sum of 250*l.*, and that thereupon the said last-mentioned plaintiff positively denied that any such payment had been made, and thereupon he (Lord Brougham) reminded the said plaintiff of the place and the circumstances under which it was paid, but that the said plaintiff continued to deny the receipt of the said sum, or of any sum in the year 1835. And while the said discussion was proceeding the said William Brougham went to the place of business of the said firm of John Robson & Co., and there saw a person connected with the firm, and informed him, as the fact was, that there was a dispute then going on between the defendant and the said last-mentioned plaintiff as to an item of payment; and the said William Brougham requested the said person to turn to the books of the said firm, and that the said person did turn to the said books, and did shew the same to the said William Brougham, who therein saw an entry of the said payment of the sum of 250*l.* to the firm to the credit of the defendant last named, in the month of June 1835, and the said William Brougham made a copy of such entry, and returned to the house of the defendant, and there found him and the said last-mentioned plaintiff still discussing the bill, when the said William Brougham produced the copy of the entry, and informed the last-mentioned plaintiff of the circumstances under which he had obtained the same, and thereupon the said last-mentioned plaintiff could no longer deny the payment, but expressed himself willing to give credit for the said sum of 250*l.*, and which he did accordingly then and there. And the defendant Henry Lord Brougham and Vaux also stated that under the circumstances aforesaid he entertained an impression unfavourable to the correctness of the mode of transacting business

used by the said firm of John Robson & Co., and on that account he caused the rest of the claim of the said firm amounting to 600*l.* and upwards to be closely looked into and investigated, between the said month of December and the following month of March, when numerous overcharges were detected in the account, insomuch that in the month of March 1836 the said claim of 600*l.* and upwards, was wholly satisfied by a payment of 280*l.* or thereabouts by the defendant to the said firm; and under the circumstances aforesaid the defendant conceived it to be his duty, as one of such trustees and executors as aforesaid of the late Viscount, to investigate most rigorously the account of the said plaintiffs against the estate of the said late Viscount, regard being had to the aforesaid circumstances connected therewith.

Exceptions for impertinence were taken by the plaintiffs to the latter part of the joint answer of the defendants containing the separate statement of Lord Brougham respecting his transactions with the plaintiffs' firm in the year 1835; these exceptions were allowed by the Master, and the Master's report was now excepted to by the defendants.

Mr. Bethell and *Mr. Bagshawe* appeared for the exceptions; and

Mr. Rolt and *Mr. Glasse* supported the Master's report.

The VICE CHANCELLOR.—My opinion is, that the exceptions to the Master's report must be allowed. The case stands in this way. The plaintiffs, Messrs. Robson, by their bill, which is not a simple creditors' bill in the common form, have set forth a contract between themselves and the late Lord Melbourne, for the supply of three carriages of a certain description, for which a specified sum was to be paid. This contract was made in 1848, the year in which Lord Melbourne died, for a term of seven years, and there was to be a payment in advance, upon which it is not necessary to make any observation, because that appears to be the usual course with respect to the hire of carriages in London. The bill then states Lord Melbourne's death and the probate of his will, and it enters into a number of small circumstances shewing

a reluctance on the part of the executors to pay what was alleged to be due on the fair construction of the contract. The bill then alleges the possession of assets, and proceeds at much more than ordinary length to ask relief. To this bill Lord Brougham and Mr. Ellice put in their joint answer, which is necessarily made long, because they were obliged to put in an answer to a great number of minute particulars. There appears to have been a good deal of chaffering between the executors and the plaintiffs, in which the names of different parties as agents on both sides are introduced. The bill contains some very pointed interrogatories, and it appears that in three different places they are constructed with a degree of point seldom seen, because the question of the possession of assets and the usual questions as to books and papers are made to end with the emphatic words, "and why," and the same words "and why" are used when the executors are called upon to set forth the particular circumstances under which they resist the general claim of the plaintiffs, which rendered it necessary for the defendants to set forth the reasons why they did not accede immediately to the demand of the plaintiffs, and Lord Brougham was particularly called upon by the pointed form of the interrogatory to state the reasons upon which he relied for not settling the plaintiffs' claim. The answer of the defendants set forth the whole transaction with reasonable succinctness, and represented some circumstances which took place in the year 1835, which, according to that statement, were such as would induce any person who had dealings with Messrs. Robson & Co. to inquire into their claim with more than usual diligence. I could understand if the bill had been framed in the simple form of a creditors' bill, it might have been said by the plaintiffs, that this story, told in the answer, was impertinent, but in order to judge of that, attention must be called to the mode in which the matter is treated in the bill. The question asked was, "Whether the defendants, or one, and which of them, did not refuse to pay the plaintiffs' demand, or some and what part thereof, and why?" Here, then, was the emphatic word "why," and my opinion is, that the plaintiffs would

have had a right to except to the answer for insufficiency if it had not been full, so as to cover the whole importance of the word "why." It therefore appears to me that the plaintiffs, by the way in which they have constituted their own case, by needless particularity, have brought upon themselves what has taken place; and I cannot but think, if due attention had been paid to the mode in which the case on the bill is framed, the Master would not have allowed exceptions to the answer. My opinion therefore, is, that the Master is wrong, and the exceptions to his report must be allowed.

WIGRAM, V.C. }
1849. } RIGBY v. THE GREAT WEST-
Nov. 26; } TERN RAILWAY COM-
Dec. 4. } PANY.

Accounts—Reference—Motion—Costs.

If accounts are directed to be kept, with regard to future events (which subsequently happen) on a case not raised by the pleadings, and distinct from the points to be decided by the decree, it is in the discretion of the Court to hear a motion for such reference before, or to postpone it until, the hearing of the cause. Therefore, where lessees of premises filed a bill for an injunction to restrain the lessors from committing an alleged breach of their covenant, and the Court directed the plaintiffs first to establish their rights at law, the lessors undertaking to keep certain accounts, and to pay what this Court might award for damages to the plaintiffs, it was held, on motion before the hearing by the plaintiffs, who had succeeded at law, but who, pending the proceedings, had parted with their interest in the subject-matter of the litigation, that they were entitled to an order of reference to take the accounts directed, without bringing the cause to a hearing or filing a supplemental bill, the defendants not assigning any reasons for postponing the motion until the hearing, and the justice of the case not requiring a supplemental bill.

The motion of the plaintiffs respecting their costs of the proceedings at law, was ordered to stand over, without prejudice to the question of the costs of the motion, until the report

had been made, upon the grounds that the costs of such proceedings might be affected by the result of the reference.

At the time of the filing of the bill in this suit (10th of May 1845) the plaintiffs (J. D. & C. Rigby) were lessees from the defendants, the Great Western Railway Company, for the term of ninety-nine years, granted by indenture of lease of the 18th of December 1841, of certain refreshment rooms and premises at the Swindon station on the line of the Great Western Railway; which premises by an underlease of the 24th of the same month they underlet for a term of seven years to one S. G. Griffith, who was subsequently made a defendant. The company having begun to run trains called "express trains," which did not stop at the above station for the refreshment of the passengers, contrary, as the plaintiffs alleged, to the covenant in that behalf contained in the lease to them, the present suit was instituted to restrain the company from running such trains without stopping for the above purpose, and the bill merely prayed for an injunction to that effect. On the first motion for the injunction (a demurrer by the company to the bill having been previously overruled), the Court, by its order of the 15th of May 1845, ordered that the plaintiffs should be at liberty to bring two actions at law touching the matters complained of by the bill, the company undertaking to keep an account of all passengers who should daily pass the Swindon station in the "express trains," and also of all passengers who should daily pass there in other trains and stop for refreshment. The actions were decided in favour of the plaintiffs; and in Hilary term 1846, they renewed the motion for an injunction until the hearing, and the company applied for a case to be sent to a court of law for the purpose of trying a question (1) alleged to have been inadvertently omitted to be raised at the trial of the above actions. The Vice Chancellor accordingly sent a case to the Court of Exchequer, and, by an order of the 23rd of January 1846, granted

(1) Whether the plaintiffs were liable at law to the defendant Griffith for any loss which he might sustain from the "express" trains ceasing to stop at the Swindon station.

the injunction in the mean time (2). Upon appeal to the Lord Chancellor (Cottenham), in the July following, his Lordship dissolved the injunction, the company continuing to keep the accounts ordered by the Vice Chancellor, and undertaking, further, to pay to the plaintiffs such damages as the Court might thereafter award (3).

The case of the plaintiffs is fully stated in the report of the hearing of the renewed motion before Vice Chancellor Wigram.

The term of the under-lease to the defendant Griffith had now expired, and the plaintiffs had assigned the premises to a third party. Their right to the injunction prayed by the bill was consequently waived.

The present application comprised two motions, on behalf of the plaintiffs, one for payment of the costs of and consequent upon the proceedings at law (in all of which they had been entirely successful) (4), and the other, for a reference to the Master founded upon the company's undertaking before the Lord Chancellor to keep the accounts and make the payments directed by his Lordship.

Mr. Wood and Mr. J. Baily, for the motion.

The Solicitor General and Mr. T. Stevens, contra.

Dec. 4.—WIGRAM, V.C.—The plaintiffs in this case filed their bill to restrain the defendants, the Great Western Railway Company, from running certain trains without stopping at the Swindon station for the purpose of the refreshment of passengers, in violation of a contract between the plaintiffs and the company for that purpose. At the time the bill was filed, the alleged injury, or that which the plaintiffs sought by their bill to restrain by injunction, had not been committed, but the company had given notice of their intention to do that which it was the object of the suit to prevent. The bill, therefore, was confined to the injunction only. A motion for an injunction was made before me, and I required the plaintiffs before I granted it, to establish their right at law, the Great

Western Railway Company undertaking to keep certain accounts. The parties went to law accordingly, and proceedings were had, under which they had an opportunity of trying every question, both of fact and of law, which they thought fit to try. In those proceedings the plaintiffs were altogether successful, and then the above application for an injunction was renewed before me. Upon that occasion the defendants (the Great Western Railway Company) asked me to direct a case for the opinion of a court of law, upon a question of law which it was said they had inadvertently omitted to submit to the judgment of the Court at the former trial, and they resisted the injunction being granted in the mean time. I thought the company were entitled to that which they asked; but, as it was admitted that they might have tried, on the former trial, the question then for the first time raised, I thought the injunction ought to go in the mean time. On appeal to the Lord Chancellor (Cottenham), his Lordship disapproved of the course I had taken in granting the interim injunction; and in lieu thereof he required the company to submit to an undertaking by which they bound themselves, not only to keep the accounts which I had required them to keep in the first instance, but also to undertake to pay what, if anything, the Court might find due to the plaintiffs for whatever injury they might sustain by their continuing to run their trains in the manner objected to by the plaintiffs. A case was accordingly carried to a court of law, and the opinion upon it has been in favour of the plaintiffs. I may here observe, that by this decision, unappealed from, I consider the plaintiffs have completely established their case at law against the company, and I consider also, as a consequence of this, regard being had to the proceedings in this suit, that they have established their right to an injunction, supposing it necessary for the protection of their rights. But this is no longer necessary, for the interest the plaintiffs had in obtaining an injunction has ceased by efflux of time, and they have no interest in prosecuting the suit to a hearing for the purpose of making the injunction perpetual, or any other purpose connected with the injunction.

(2) 15 Law J. Rep. (N.S.) Chanc. 266.

(3) 2 Ph. 44.

(4) 18 Law J. Rep. (N.S.) Exch. 404.

The only points remaining to be decided in the cause are three : first, the costs of the suit in equity ; secondly, the costs of the proceedings at law (assuming for the moment that these are not part of the costs of the suit in equity) ; and thirdly, the account. In this stage of the cause I have two motions before me, both of them on the part of the plaintiffs. By one, as modified at the hearing, they ask payment of the costs of the proceedings at law ; and by the other they ask a reference to the Master, founded upon the company undertaking before the Lord Chancellor to keep the accounts and make the payments to which the company are liable by their undertaking.

I will dispose of the last point first. The objection is, that the account must be matter of decree, or, at all events, that the plaintiffs are not entitled to a reference on motion before decree. No special case has been made in support of the objection ; but the general practice of the Court, it is said, forbids it. My opinion is, that it is in the discretion of the Court to direct the reference asked upon motion, and that before decree, or to postpone it to the hearing of the cause, according as the justice of the case may require. If, indeed, the Lord Chancellor had simply required the company to keep the account which he required in the first instance, it might have been said, that the object of the Court was merely to preserve evidence, the benefit of which the plaintiffs might obtain by supplemental bill. But the undertaking went further : the company have undertaken to account and pay as the Court shall direct ; and as this account and payment could not be had in the present suit without the undertaking, I think it clear the Court must have intended to give the plaintiffs in this suit such relief as they might be entitled to without filing a supplemental bill, unless indeed the justice of the case required that proceeding. In fact, if the reference were saved to the hearing, such reference could only be made upon motion, the case upon which it is founded not being in the pleadings. The objection on that point is simply this : the undertaking is to pay as well as to keep the accounts, and the question is, how and when are the plain-

tiffs to have the benefit of that undertaking ? If the time is to be postponed to the hearing, a motion would be necessary to get the plaintiffs the benefit of the undertaking by decree. The question, then, whether the motion for a reference is to be made before or at the hearing must be in the discretion of the Court. In this case, no reason is found on the merits for postponing the reference, or for requiring a supplemental bill, because, not being on the pleadings, it is distinct from the points to be decided by the decree.

The only question then is, whether the question of costs, which remains to be disposed of, alters the case. There is not now any doubt that where the Court directs an issue, or an action in the nature of an issue, for the guidance of its own conscience, it may, in the exercise of its discretion, dispose of the costs before the hearing, as in the case of *Duncan v. Varty* (5). I confess, however, I had a doubt at one time whether the costs of the proceedings at law ought not in the present case to be dealt with at the same time with the costs of the suit in equity, for those proceedings were had under a general rule which obliges a plaintiff to establish his right at law before he obtains the assistance of a court of equity, as in patent cases, or the like. Strong reasons, however, may be found against the distinction, and I did not venture to act upon it ; but, as the result of the reference upon the matter of account may affect the question of costs, as it might have done if the account had been asked by the bill and a reference directed by the decree, I think it better to order the motion respecting the costs to stand over until after the Master shall have made his report upon the reference. I propose to direct this part of the order to be without prejudice to the question by whom the costs of the motion should be paid. I am not at all clear whether, if the cause had come to a hearing, there would have been any necessity for making any special application for costs. I think not. When the reference shall have been finally answered, the purposes of the suit will have been satisfied, and nothing but the costs will remain to be disposed of. The plaintiffs will then

have to consider the course they have to pursue with reference to the question in *Sivell v. Abraham* (6). Refer it to the Master to inquire whether any and what losses have been sustained by the defendant Griffith in respect of the running of the trains from day to day without stopping at the Swindon station for the purpose of refreshment.

M.R. }
May 30. } BUTLER v. GARDINER.

Pauper—Order to sue in formâ pauperis—Suppression of Facts—Discharge.

A plaintiff was entitled to an annuity of 20l. a-year, which her brother ordered to be secured to her. She filed a bill to have it secured, and obtained an order to sue in formâ pauperis. The executors of her brother, though they did not admit assets, paid the annuity, but this fact was not stated to the Court, and in consequence the order to sue in formâ pauperis was discharged.

On the 17th of December 1849 the plaintiff, Susannah Butler, obtained an order of course to sue *in formâ pauperis*. The application was supported by her affidavit, which stated, "that my just debts being first paid, and my wearing apparel and the matter in question in the cause only excepted, I am not worth the sum of 5l." It now appeared that the plaintiff was entitled to an annuity of 20l. a-year under the will of her father, whose business was taken by James Butler, her brother; and he, by his will dated the 17th of July 1843, charged the business with the payment of the annuity of 20l., theretofore payable unto his sister, Susannah Butler, so long as the same trade or business should, if at all, be continued and she should remain unmarried, to be paid quarterly, together with all arrears due at his death, and a proportional part of the same annuity up to and inclusive of the day of her death or marriage. And in case his business should be discontinued while the annuity should be payable, the testator directed his trustees, out of the residue of his personal estate or the proceeds, to make

an investment in the public funds to answer the annuity. James Butler died on the 15th of December 1847, and his will was proved by William Gardiner and Edward Haward, the executors.

The suit was instituted by S. Butler, against the executors of her brother's will, to have the annuity secured, and they, though they denied assets, paid the annuity to the plaintiff from the death of their testator up to the 15th of December 1849.

By the decree made on the 5th of March 1850, a sum of 666l. 13s. 4d., consols, was set apart in court to secure the annuity, and the dividends were ordered to be paid to the plaintiff. A direction was also given to take further accounts, which included arrears of the annuity due at the death of her brother, and proceedings for that purpose were still pending before the Master.

Mr. Toller moved to discharge the order to sue *in formâ pauperis*.

Mr. Chandless, in support of the order. —The suit is still going on; though a fund has been brought into court to secure the annuity, still there are arrears of it which were due at the death of the plaintiff's brother, and the accounts remain to be taken.

THE MASTER OF THE ROLLS.—The plaintiff was entitled to an annuity of 20l. a-year, which is the subject of this suit. The executors of her brother's will paid it regularly previous to her making the affidavit to obtain the order to sue *in formâ pauperis*. That fact should have been stated; its omission is fatal to the order.

Mr. Toller asked for the costs of the application.

Mr. Chandless.—They are not asked for by the notice of motion.

THE MASTER OF THE ROLLS.—I have acted upon the impression that they ought to be asked for in the notice of motion; but the Lord Chancellor has decided that the Court may give them without their being asked for by the notice of motion. I discharge the order, with costs.

See *Spencer v. Bryant* (1), *Taprell v. Taylor* (2), and *Clark v. Jaques* (3).

- (1) 11 Ves. 49.
- (2) 9 Beav. 493.
- (3) 11 Ibid. 628.

WIGRAM, V.C. } *In re* THE DENDRE VALLEY
 April 27, 29 ; } RAILWAY AND CANAL
 June 8. } COMPANY, *ex parte* MOSS.

Jurisdiction — Discretion of Court under Winding-up Acts — English and Foreign Joint-Stock Company — Collateral Contract — Order of Reference — Service.

An Anglo-Belgian company, constituted a société anonyme, with domicile at Brussels, a board of directors there and in London, and shares divisible equally between English and Belgian allottees, was formed for making a railway and canal in Belgium; but being unable to complete the undertaking within the time limited, contracted, with the concurrence of the Belgian Government, to lend the caution-money to other railway companies for a definite period :—Held, on the petition of an English shareholder, that the company was within the operation of the Winding-up Acts, and that, notwithstanding the collateral contract into which the company had entered, the Court had jurisdiction to adjudicate in respect of the English shareholders.

Reference ordered to the Master to inquire whether the original undertaking had been finally abandoned, or merely suspended, and could hereafter, as between the company and the Belgian Government, be resumed; and, if abandoned or incapable of being resumed, whether it would be expedient to make an order to wind up the affairs of the company.

This was a petition, under the Winding-up Acts, 1848 and 1849 (1), for an order to dissolve and wind up the Dendre Valley Railway and Canal Company. The petitioner, Samuel Tenison Moss, was an English allottee and holder of fifty shares. The company was formed, in 1845, under a concession from the Belgian Government granted by two royal ordinances, dated in June 1845, for ninety years from the completion of the undertaking, for the construction of a line of railway from Ath to Termonde along the valley of the Dendre, and also of a canal from Mons to the river Scheldt *via* Jemmappes and Alort. Capital 45,000,000 francs (1,800,000*l.* sterling) in 90,000 shares of 500 francs (20*l.* sterling) each; deposit 50 francs (2*l.* sterling) per share, and one-half of the shares to be

allotted in Belgium. The applicants for shares undertook to conform to the statutes, rules and regulations duly authorized by the laws of Belgium, upon such conditions as the directors should accept the same. The company was to be constituted a *société anonyme*, and the liability of the shareholders limited according to the Belgian law. A dividend of 7*l.* per cent. of the net profits was to be paid to the shareholders, and the remainder divided between them and the *concessionnaires* or their nominees. An English board of directors for the management of the affairs of the company was appointed in London, and the same directors named in the prospectus were in office when the petition was presented. The deposits in England amounted to 61,400*l.*, and in Belgium to 9,800*l.* The sum of 2,000,000 francs (80,000*l.* sterling) was invested in the purchase of Belgian stock, and duly deposited in June and July 1845 as caution-money for the completion of the undertaking, one-half being in respect of the railway, and the other in respect of the canal. The further sums of 19,860*l.* and 600*l.* were respectively paid by the English and Belgian allottees upon a call made in November 1845. The line was surveyed, and the plans, &c. approved by the Minister of Public Works in Belgium in July 1846; and in July 1847 the deed of incorporation received the signature of the King of the Belgians, and the company thereupon became a *société anonyme* according to the Belgian law. The time limited for the completion of the undertakings expired in July 1848. In July 1847 the directors made a report to the shareholders, stating that the whole amount then received for shares was only 91,800*l.*, of which 81,400*l.* had been paid to the London bankers, and 10,400*l.* to the Brussels bankers, and that the then expenditure and liabilities amounted to 15,484*l.*; and submitting a proposition for the dissolution, &c. of the company. At a general meeting held at Brussels, in August 1847, it was resolved to empower the directors to negotiate with the Belgian Government for the most favourable arrangement which they could obtain, and to adjust the claims against the company with a view to its dissolution. The Belgian Government refused to allow

(1) 11 & 12 Vict. c. 45, and 12 & 13 Vict. c. 108.

any modification of the undertaking in consequence of the deficiency of capital, or to return the caution-money. The directors subsequently agreed by a contract, which had been sanctioned by the Minister of Public Works, passed by the Chamber of Deputies, and received the royal assent, to lend the amount of the caution-money for two years to the Tournay and Jurbise and the St. Fronde and Hafrett Railway Companies, at interest, payable in equal moieties to this company and the Belgian Government. The agreement was carried into effect under a convention, made in April 1848, between the Minister of Public Works in Belgium and the several directors of the Tournay and Jurbise Railway, the St. Fronde and Hafrett Railway and the Dendre Valley Railway and Canal Companies, and in the convention it was recited that the directors of the latter company were unable to complete either their proposed railway or canal before the expiration of the time limited for that purpose.

In opposition to the petition were read the opinions of certain foreign jurists stating that a *société anonyme* in Belgium could not be dissolved without the royal authority, and the affidavit of the secretary denying that the undertaking had been abandoned.

The company had not any offices or place of business in England, and its domicile was at Brussels.

The Solicitor General and *Mr. Roxburgh*, in support of the petition, cited the case of *The Madrid and Valencia Railway Company, ex parte James* (2).

Mr. Bacon and *Mr. Rogers* opposed the petition, and submitted that the Court had to try a totally different case from that cited. They relied upon two grounds of argument against the petition. First, that the allegation of the company having abandoned its undertaking had not been proved, but, on the contrary, had been totally disproved. Secondly, that the contract made by the company was with a foreign government, and this Court had not jurisdiction to dissolve it. The secretary had distinctly sworn that the undertaking had not been abandoned. All that

had been done was to lend the funds, with the consent and concurrence of the Belgian Government, to two other companies. When the latter should have completed their works, it was possible that this company might, with the permission of the Belgian Government, resume and complete its undertaking. If the company should be dissolved by an order of this Court, the Belgian Government would be at liberty to claim as forfeited the sum which had been deposited as caution-money: a result which this Court would never produce by any act of its own. In fact, the Court was asked to dissolve by its order a contract entered into by the English and Belgian directors with the Belgian Government.

[WIGRAM, V.C.—The principle to be decided is this: a company, partly English and partly foreign, enters into a collateral contract. If the company were wholly English, would that contract exclude the operation of the Winding-up Acts, or prevent the exercise of the jurisdiction of this Court?]

The company had been constituted a *société anonyme*, which could not be dissolved in Belgium without the royal authority. Again, the place of domicile which, the Belgian Code of Commerce required every company to specify, had been fixed by the convention to be at Brussels. Would the Court direct service of its order to be made there? At all events, the only order which could be made in the present case was, for a reference to the Master to ascertain and state the facts, and it would then be in the discretion of the Court, under the 12th section of the Winding-up Act, 1848 (3), to make an order for the dissolu-

(3) 11 & 12 Vict. c. 45. s. 12.—“That on the hearing of any such petition it shall be lawful for the Court, if it shall not think fit in the first instance to make an order absolute, to require any parties to shew cause, within such time as the Court shall think fit, why the company should not be dissolved and wound up or wound up under this Act, or to make an order for the dissolution and winding up or for the winding up of such company, conditional on the non-fulfilment of such terms and by such parties as the Court shall think fit, or to refer it to the Master to make preliminary inquiries as to the necessity or expediency of the dissolution and winding up or of the winding up of such company; and it shall be lawful for the Court, in case no sufficient cause be shewn, or in

(2) 1 Hall & Twells, 597; s. c. *ante*, p. 260.

tion of the company and the winding up of its affairs.

The Solicitor General, in reply, contended that the case was sufficiently clear for the Court at once to make the usual order for dissolution and winding up, without referring the petition preliminarily to the Master to ascertain the facts. The convention of April 1848, to which the directors of the company were parties, recited their inability to complete the undertaking within the time limited. Admitting the opinions of the foreign jurists relative to the dissolution of a *société anonyme* to be correct, it might be argued that they were applicable only to the term of years for which the concession was granted, and which would not commence until the expiration of the three years previously limited for the completion of the undertaking. The completion of the undertaking was a condition precedent; and it was quite clear that the company might be dissolved without the royal assent in Belgium, by non-completion of the undertaking within the time limited—*Cohen v. Wilkinson* (4). As to the rights and liabilities of shareholders, he cited—

Reynell v. Lewis and Wyld v. Hopkins,
15 Mee. & W. 517; s. c. 16 Law
J. Rep. (N.S.) Exch. 25.

In re the Universal Salvage Company,
ex parte Earl of Mansfield, 1 Hall
& Twells, 593; s. c. ante, p. 258.

June 8.—WIGRAM, V.C. delivered out the following judgment to the parties:—In considering this case, the distinction must be carefully kept in mind between, first, the law which is to govern the Court in winding up the affairs of this company, and secondly, the law which is to govern the Court in deciding whether the petitioner is now entitled to require this Court to make an order

case the terms of any such conditional order be not fulfilled, or in case it shall appear from the Master's report, upon such reference as aforesaid, that the dissolution and winding up or the winding up of any such company under this act is necessary or expedient, to make such order absolute as hereafter mentioned."

(4) 1 Hall & Twells, 554; s. c. 1 Mac. & Gor. 481; 18 Law J. Rep. (N.S.) Chanc. 411 (coram M.R. and affirmed by the Lord Chancellor, Nov. 8, 1849).

for winding up its affairs. I observed during the argument (the point scarcely required the observation) that this Court, having the proper parties before it, may administer foreign law, treating that law as a question of fact to be ascertained by evidence. A party of Englishmen may have a partnership confined to themselves for constructing a railroad in a foreign country. In such a case the contract may clearly be subject to the Winding-up Acts, as part of the law of this country; but the law which is to determine the rights of the parties may be the law of that country in which the railroad is to be constructed. In the case now before me, looking at the original proposals for forming the company, and the terms of the convention between the Belgian Government and the promoters of the undertaking, and the laws of Belgium so far as they are in evidence before me, it is plain that the laws of Belgium must be adverted to for the purpose of determining what the rights of the shareholders are. But this is not the only matter I have now to adjudicate upon. This matter involves several questions. First, what law is to govern me in deciding whether I am to make an order for winding up the affairs of this company or not; and, having decided that, secondly, whether I ought to make an order for that purpose, and upon what terms. In this case the ground upon which I am asked to make an order for winding up the affairs of the company must be brought under the clauses of the act, which entitle a contributory to the order sought by the petition. The clauses run thus:—"If any company shall have been dissolved, or shall have ceased to carry on business, or shall be carrying on business only for the purpose of winding up its affairs, and the same shall not be completely wound up: or if any other matter or thing shall be shewn which in the opinion of the Court shall render it just and equitable that the company should be dissolved" (5). Now, upon the question whether the company has been dissolved, or has ceased to carry on its operations, —and by parity of reasoning, the question whether there exists any other matter or thing which, in the opinion of this Court,

(5) 11 & 12 Vict. c. 45, s. 5, clauses 7. and 8.

shall render it just and equitable that the company shall be dissolved,—I confess myself unable to come to a conclusion without more information than I now possess as to the law of Belgium. Has the company, according to that law, finally abandoned its intention to carry out its original undertaking, or is the intention to carry out the original undertaking suspended only under an arrangement come to with the Belgian Government? Is the company, as between itself and the Belgian Government, discharged from its obligation to complete its original undertaking? Has the company a right, as between itself and the Belgian Government, to say that it will hereafter resume its operations and complete the original undertaking? The petitioner in this case must be considered and treated as a party to the convention and other proceedings of the company, and the law of Belgium must determine whether the petitioner and all the shareholders in the company are bound by the new arrangement come to with the Belgian Government, and what is the present position of the company. In the case of *The Madrid and Valencia Railway Company*, the Lord Chancellor Cottenham was of opinion that the evidence before the Court was sufficient to shew that the undertaking was put an end to by the acts of the Spanish directors. That, in principle, is the very question upon which I am not satisfied in the present case, and upon which I require further information. The information which I require for that purpose will throw much light upon the other questions upon which also I am in want of information. The inquiries which I propose to direct, and which when answered will, I hope, enable me to determine both questions satisfactorily, are, whether before the petition was presented, the Dendre Valley Railway and Canal Company in the petition mentioned had finally abandoned the original undertaking therein mentioned; or whether the intention to carry out the original undertaking was suspended only under the arrangement come to with the Belgian Government in the petition mentioned; and whether the said company, as between itself and the Belgian Government, was discharged from its obligation to complete its original undertaking; and whether the

said company has a right, as between itself and the Belgian Government, hereafter to resume its operations and complete the original undertaking. And if the Master shall find that the original undertaking has been abandoned, or that the company has no right to resume its original undertaking, let him inquire whether it is expedient that the affairs of the company should be wound up; and let the inquiries hereby directed be without prejudice to any question in the matter, and let the said Master report specially as he may think fit, at the request of either party; and, for the better making the said report, the parties are to produce books, &c. Liberty to apply.

M.R. } CARLISLE v. THE SOUTH-
March 23; } EASTERN RAILWAY COM-
April 16, 17. } PANY.

Railway Company—Payment of Dividends—Court of Equity—Jurisdiction—Judicial Discretion—Act of Parliament—Acquiescence.

The Brighton, Lewes and Hastings Railway Company was by the 8 & 9 Vict. c. cc. empowered to transfer a portion of the line thereby authorized to be made to the South-Eastern Railway Company. The act contained a provision that, if the portion of the line to be transferred should not be completed within three years from such transfer, it should not be lawful for the South-Eastern Railway Company to pay any dividends until the whole of the railway should be opened to the public for traffic. On the 21st of August 1845, a deed was executed transferring a portion of the line to the South-Eastern Railway Company, but they neglected to complete that portion of the line within the three years limited for that purpose. Upon a bill filed by a shareholder, on behalf of himself and others,—Held, that the act was imperative, and that the South-Eastern Railway Company could not, after the expiration of the three years, pay any dividend whatever until the line was opened to the public for traffic.

Held, also, that the Court might exercise a discretion, and upon a proper case being made might abstain from exercising its autho-

urity to restrain the payment of a dividend which had been declared, and leave was given to bring forward such a case on affidavit.

Held, also, that the plaintiff by receiving dividends was not prevented from applying for the intervention of the Court to prevent a public benefit from being carried out, and the company and the directors were restrained from paying any future dividends, and also, an insufficient case having been made, from paying the dividend which had been already declared until the line was opened for traffic.

This bill was filed by Thomas Carlisle, on behalf of himself and all others the shareholders in the South-Eastern Railway Company, except the defendants, against the South-Eastern Railway Company, and against James Macgregor and the other directors of the company, praying for a declaration, under the circumstances stated, and charged in the bill, that the payment of any dividends by the South-Eastern Railway Company was illegal and ought not to be made, and that the company and the directors, secretary, treasurer, bankers, and agents of such company and directors might be restrained from paying any dividend upon any of the shares in the said company, and that whether such dividend should have been already declared or should thereafter be declared, until so much of the railway by the Brighton, Lewes and Hastings Railway Act authorized to be made, as had been transferred to the South-Eastern Railway Company should be opened to the public for traffic.

The bill stated that the South-Eastern Railway Company was incorporated by the 6 & 7 Will. 4. c. lxxv., and that in February 1845, they contemplated making a railway from Hastings to Ashford. At the same time the Brighton, Lewes and Hastings Railway Company intended to make a line of railway which would include one from Hastings to Ashford, and the 8 & 9 Vict. c. cc. intituled 'An Act to enable the Brighton, Lewes and Hastings Railway Company to make a railway from Bulverhithe, in the county of Sussex, to Ashford in the county of Kent,' was passed. It empowered the company to use the name of the Brighton, Lewes and Hastings Railway Act, Hastings, Rye and Ashford Extension, 1845, and to make a line of railway to

commence by a junction with the main line of the Brighton, Lewes and Hastings Railway in a field near the Bull Inn, in the parish of St. Mary, Bulverhithe, in the county of Sussex, and terminate by a junction with the South-Eastern Railway at or near the station at Ashford, in the county of Kent; and by section 39. of the act, after reciting that a railway from St. Leonard's and from Hastings to Ashford had been projected by the South-Eastern Railway Company in a direction similar to that of the line authorized by the act, and that the Brighton, Lewes and Hastings Railway Company was willing that so much of the line by this act authorized as lay between a point in the parish of St. Leonard's, where the Brighton, Lewes and Hastings Railway Company intended to make a station, and which was distant from the point of junction with the Brighton, Lewes and Hastings Railway in the parish of St. Mary, Bulverhithe, one mile and thirty chains, or thereabouts, and Ashford, should be executed by the South-Eastern Railway Company, and that the last-mentioned railway company were willing to adopt such portions of the said last-mentioned line in lieu of the one projected by them, it was enacted that it should be lawful for the Brighton, Lewes and Hastings Railway Company, with the consent in writing of the London and Brighton Railway Company, under their corporate seal, by any deed or instrument under their corporate seal, to transfer to the South-Eastern Railway Company all the powers of the act conferred with reference to the purchase of lands, and execution of so much of the railway as laid between a point in the parish of St. Leonard's and Ashford, and the maintenance and use thereof, and the levying and recovery of tolls and charges in respect of the same, and that on the execution of such transfer it should be lawful for the South-Eastern Railway Company to use, exercise, and enjoy all the powers thereinbefore given, so far as the same related to that portion of the said railway in relation to which such powers might be transferred to them, in like manner as though they had been specifically authorized so to do in lieu of the Brighton, Lewes and Hastings Railway Company, and that such portion of the said railway when executed

should be and become part and parcel of the undertaking of the South-Eastern Railway Company. And by section 40, it was enacted, that for the purpose of executing the said railway, it should be lawful for the South-Eastern Railway Company to raise by the creation of new shares the sum of 410,000*l.*, and when one-half of the said sum should have been paid up, to borrow on mortgage the sum of 136,000*l.*, and also to apply to the formation of the said railway any portion of the capital which they were then authorized to raise. And by section 42, it was provided, that if so much of the railway by the act authorized to be made as might be transferred to the South-Eastern Railway Company, should not be completed within three years from the completion of such transfer, it should not be lawful after the expiration of the said period for the South-Eastern Railway Company, unless authorized by parliament so to do, to pay any dividend until the whole of the said railway should be opened to the public for traffic. The time which the act for the making the railway limited for its completion was seven years from the passing of the act.

By an indenture, dated the 21st of August 1845, and made between the Brighton, Lewes and Hastings Railway Company of the first part, the London and Brighton Railway Company of the second part, and the South-Eastern Railway Company of the third part, the Brighton, Lewes and Hastings Railway Company, with the consent of the London and Brighton Railway Company, transferred unto the South-Eastern Railway Company all the powers by the act of the 8 & 9 Vict. c. cc. conferred on the Brighton, Lewes and Hastings Railway Company, with reference to the purchase of lands and the execution of so much of the railway by the said act authorized to be made as laid between the said point in the parish of St. Leonard, where the Brighton, Lewes and Hastings Railway Company intended to make a station, and Ashford, and the maintenance and use thereof, and the levying and recovery of tolls and charges in respect of the same, in as full and ample a manner as the Brighton, Lewes and Hastings Railway Company could or might have exercised the same powers.

On the 11th of September 1845, in pursuance of resolutions of the company passed on the 6th of February 1845, shares called Consolidated No. 3 Shares were created by the South-Eastern Railway Company, for the purpose of completing, among others, that portion of the line transferred to them. The bill then stated the several local acts, 9 & 10 Vict. c. lv., 9 & 10 Vict. c. lvi., 9 & 10 Vict. c. lxiv., and 9 & 10 Vict. c. cccv.; the whole of which empowered the South-Eastern Railway Company to raise additional capital by the creation of new shares, and that shares under these acts were created, and were called No. 4 Shares, and that the plaintiff was the purchaser and registered proprietor of 100 of the No. 4 shares. That the three years, limited by the 42nd section, expired on the 21st of August 1848, but that portion of the Brighton, Lewes and Hastings Railway which had been transferred to the South-Eastern Railway Company was not completed or near completion. That the company, notwithstanding the prohibition in the 8 & 9 Vict. c. cc., had, since the expiration of the period of three years paid, and were continuing to pay, the dividends which from time to time since that period had been declared on the shares in the South-Eastern Railway Company, and that they had paid one half-yearly dividend, declared in March 1849, and another half-yearly dividend declared in September 1849. That the company and the directors contemplated and intended to procure another dividend to be declared by a general meeting of the shareholders, which had been called and was to be holden on the 14th of March last. That since the 21st of August 1848 the payment of dividends on any of the shares in the company had been and still was illegal. That the holders of No. 3 and 4 shares had not received any dividends; but as an inducement for shareholders to pay the calls, the company had resorted to the expedient of paying interest at 5*l.* per cent. on the amount of such calls paid up out of the capital of the company, and that it was illegal and wasteful and injurious to the company. That the capital of the company, by the misapplication of the directors, had become insufficient to meet the purposes for which it was raised. That

there did not remain sufficient of the capital raised upon the No. 3 shares to complete the railway, and that it had become necessary for the company to apply to parliament for powers to raise additional capital, and that a bill had been laid before parliament for that purpose.

On the 14th of March 1850 a general meeting of the South-Eastern Railway Company was held, when a general dividend was declared on the capital of the company, in favour of the shareholders entitled to receive it; and by this motion the plaintiff sought to restrain the company and the directors from paying any dividend upon any of the shares in the South-Eastern Railway Company, whether such dividend should have been declared or should thereafter be declared, until so much of the Brighton, Lewes and Hastings Railway authorized by the 8 & 9 Vict. c. cc. as had been transferred to the South-Eastern Railway Company should be opened to the public for traffic.

Mr. Turner and Mr. W. J. Bovill, for the plaintiff. — Before the directors can legally pay any dividend to the shareholders of the company the portion of the railway transferred to them must be opened to the public for traffic: in this respect, the 8 & 9 Vict. c. cc. s. 42. is imperative.

Sir F. Kelly, Mr. Roundell Palmer and Mr. Baily, for the defendants. — The construction of the act of parliament is a question for a court of law; and its decision may be obtained on a case in time to restrain the payment of the half-yearly dividend, and in the mean time a court of equity will not interfere. The restriction contained in the 42nd section cannot apply to any dividend whatever. The company is constituted by various acts of parliament, and the shareholders are numerous. The 8 & 9 Vict. c. cc. is a substantive act, and does not even refer to many of the other acts: the terms in the act are general; but they cannot be extended to shareholders under acts not referred to: the 42nd section, therefore, cannot apply to any dividend whatever, it must be confined to dividends in respect of that particular branch which formed no part of the South-Eastern Railway until it was completed. A dividend has recently been declared;

this, therefore, was separated from the capital, and cannot now be legally applied to the formation of the railway. In any case, it will be a hardship upon the parties, who expect to receive their dividends, and it will be severely felt if the Court now interferes to prevent them from receiving the dividend declared. By the report made to the meeting the shareholders were informed that the railroad would be opened for traffic in August next, as all the land had been purchased and paid for, and the works were in an advanced state, while the company had funds sufficient applicable to the completion of the line. The plaintiff himself has acquiesced in the payment of dividends: he became a shareholder in January 1849, in the March following a dividend was declared. In September he was present at another meeting of shareholders, when another dividend was declared, both of which he had received; he has, therefore, precluded himself from obtaining any relief. If the public is aggrieved, the Attorney General may interfere, as no time can make that legal which the act says is illegal. It was in 1845 that the company resolved to pay interest to the shareholders of the Brighton, Lewes and Hastings line until it was complete; but this was, no doubt, made to avoid the hardship of the act of parliament. The plaintiff said, he did not know of the 42nd section until just before the filing the bill, but this was no excuse, and the Court will not grant the injunction.

Gray v. the Liverpool and Bury Railway Company, 9 Beav. 391.

The Attorney General v. the Mayor of Liverpool, 1 Myl. & Cr. 171; s. c. 7 Law J. Rep. (N.S.) Chanc. 51.

Hodgson v. Earl Powis, ante, p. 356.

Pickford v. the Grand Junction Railway Company, 3 Rail. Ca. 538 (1).

Mr. Turner, in reply. — It is said that the company has sufficient capital; this should be distinctly stated, and not left to inference. As to questions of convenience and inconvenience to the shareholders, they resolve themselves into a construction of the act. In this case, if the

(1) See *Pickford v. the Grand Junction Railway Company*, 10 Mee. & W. 399; s. c. 8 Mee. & W. 372; 10 Law J. Rep. (N.S.) Exch. 342.

company is allowed to pay the dividends, to whom is the plaintiff to look for its repayment? The words of the clause apply to dividends generally, and full effect must be given to them, unless other words restricting them are found in the act. It is not the true construction of the act of parliament to say, that this portion of the line does not become a part of the company until it is complete, since the payment of dividends must be considered in connexion with the 42nd section. The plaintiff asks for no order respecting the payment of interest on calls paid up. The acquiescence in a private right binds the party, but under acts of parliament for the public good the provisions of the legislature must be observed, and acquiescence has not the same effect. I do not deny the power of the Court to send this to a court of law upon the construction of the act; but if there is any doubt, the Court will restrain the payment of the dividends in the mean time.

THE MASTER OF THE ROLLS.—Whenever my attention has been called to matters of this description, I have always had to lay down the principle, that these companies and their affairs are not to be dealt with merely as private partnerships and their affairs. They are constituted for public purposes, and the public purposes which are hoped to be effected by their means; and powers are granted wholly on certain conditions which are to be found in the acts of parliament which enable them to interfere by imperial powers with the private property of any individual whose property happens to be in the line of the projected railway, for the purpose which is supposed to be the public good. Every man's property lying on the line is taken from him without his consent, his own estate is interfered with, and all the evil which must arise from the exercise of that despotic power is supposed to be compensated by the public good which is expected to be derived from the works to be accomplished by means of those powers. Those works are to be accomplished strictly upon the conditions which are imposed by their several acts of parliament, and I think I may say now, after having

heard a good many of these cases, that in every instance which has come before me, the mistake of the directors (where it has turned out to be a mistake) has arisen from the idea that they had a right to use the vast amount of property placed in their hands, and the vast amount of power given to them over that of other people, in the manner which they thought most advantageous to the company or most convenient to the shareholders, without having regard to the public objects and purposes intended to be effected by their acts of parliament. I think hardly one of these cases has occurred in which something has not arisen in the course of it which made it my duty to remind the parties of that circumstance.

In this case it seems there were three companies: the London and Brighton Railway Company, the Brighton, Lewes and Hastings Railway Company, and the South-Eastern Railway Company, who had some competition in relation to each other in reference to the line in contemplation. Some works had been effected, and some were in contemplation towards the completion of part of the line of railway from Ashford in the county of Kent to Bulverhithe in the county of Sussex. The act of parliament was passed to enable the Brighton, Lewes and Hastings Railway Company to make that railway. Regard was had to the claims or the competition of the other companies, and in consequence the powers were given which have been so particularly adverted to, and necessarily so, in the course of the argument. There were some things to be done by the company, in whose favour this act was granted, with the consent of the London and Brighton Railway Company. The point which is most important is, that, by section 39, there was a right given to them to transfer that portion of what I must call the important public duty which they had undertaken to the South-Eastern Railway Company.

As to the question which arises concerning the likelihood of these works being completed within the limited time, I can infer nothing except from this act of parliament. These powers were to expire in the course of seven years in case of

non-completion, and if the whole of this railway was completed according to the construction put upon it on one side, it was to become part and parcel of the undertaking of the South-Eastern Railway Company. Power was given to raise capital and power to receive tolls and other things which were required, and then comes the 42nd section, which has given rise to the whole question. Now, the very generality of the words in this section, it is said, creates a doubt. You are not to pay any dividend till such a time, therefore it must be construed in a limited sense. That no dividend whatever should be paid, it is said, could not be meant; and why could it not be meant? It is said, it could not be meant, because the South-Eastern Railway Company has a vast capital and a very great number of shareholders, and the dividends have been paid and were allowed to be paid during the three years to elapse before the completion of the contract. The defendants therefore say, it could not have been intended that the dividends payable to so many shareholders should be stopped if this particular line was not completed within the three years. But is it really possible to construe these words in any other manner? I have tried in vain in attending to the arguments which have been addressed to me with so much ingenuity, and I cannot find out that I have any good reason to construe those words so very general "any dividend" to mean only such dividends as might arise from such part of this Ashford and Hastings Railway as might be completed before the three years. It seems to me the most extraordinary interpretation for the Court to be asked to make which could possibly be. I dare not thus palter with an act of parliament, especially with an act of parliament in which it appears to me it was intended that this should be a condition between the parties. It may be quite immaterial whether parliament had regard to these things especially, because the object is the public benefit, and it was considered by parliament that this should be established as a duty upon these parties, and this Court has no power to relax it the least in the world. I must own, therefore, that not finding any rational mode of construing

this act of parliament, which does not necessarily infer that all the dividends of the South-Eastern Railway Company were to be stopped if this line was not completed within the course of three years, it is my opinion that the defendants are violating this act in what they are now proposing to do; and I have no hesitation in saying now, that I grant an injunction to restrain them from paying any dividends after this one which is now declared and about to be paid.

With respect to that, I am not in the least degree disposed to close the question, which has not yet been decided. I believe many of these cases, however instructive and useful they may have become to the railway companies who have considered them, have in a great measure taken them by surprise; for whilst they were proceeding in the frantic way in which they have been going on for many years past, they have not properly construed the powers granted to them, or considered the purpose for which those powers were granted, and they got into such a habit of dealing with the funds at their disposal that they were rather surprised when they found they were not at liberty to do anything out of the scope of the powers given to them. When these matters come under the decision of the Court, there is not a question to be raised, whether the companies are or are not to be stopped when proceeding in an illegal manner: but if by permitting some acts not strictly legal at the present moment, you may save a great amount of suffering to the parties who have been going on in the expectation of receiving the dividends, I think I may be allowed to do something for the accommodation of the parties. I shall therefore give leave to the defendants, if they are so inclined, to bring forward a case on affidavit, which will raise the question for my consideration. I do not think the case is sufficiently raised on the report made by the directors to the shareholders at their meeting. I dare not give credit to these railway reports. I hope the time will come when they will be framed with so much care and under such a scrutinizing superintendence that what comes from a responsible body of directors will be of such value as that it may be taken,

not as conclusive evidence, but evidence sufficient for the Court to act upon till met by other contradictory evidence. That is not the case now; and, therefore, if that point is to be raised by facts brought forward and proved on affidavit,—and certainly in a case of this kind, when I cannot doubt but that much difficulty must follow upon stopping the dividend so much expected,—I shall attend to it with an earnest expectation that I may find grounds for protecting the parties from such suffering.

As to the point of acquiescence, I do not think there is anything in that. The plaintiff coming here and asking the Court to prevent a *public* purpose from being hindered, is not to be prevented from making his application to this Court in the same way as a private person applying for *private* purposes would be barred by acquiescence. I think I must grant the injunction as to future dividends; and if the defendants are inclined to make a case on affidavit, to justify the payment of the dividend declared, I will hear it.

April 17.—This case was again brought before the Court, upon the question whether the payment of the dividend already declared should be stopped. Both sides had filed affidavits since the motion was heard, the object of the defendants being to satisfy the Court that the South-Eastern Railway Company had sufficient funds properly applicable to complete the railway.

Mr. Turner and *Mr. W. J. Bovill*, for the plaintiff.

Mr. Roundell Palmer and *Mr. J. Baily*, for the defendants—*Mayor of King's Lynn v. Pemberton* (2).

THE MASTER OF THE ROLLS.—On the original hearing I was of opinion that, the works being incomplete at the end of the time limited by the act for their completion, the plaintiff might come to restrain the payment of any dividend whatever, and an order would then have been made if it had not been suggested that there was a dividend then recently declared, which might be paid without interfering with the completion of the works; it was also

alleged that the works would be completed in August next, notwithstanding the company took out of their funds the amount of the dividend so declared. Such a statement was calculated to affect anybody. The dividend could not be withheld without a great deal of inconvenience, and perhaps suffering, and the question arose whether the Court could relax the strict rule. I allowed the case to stand over for further information, and it has since been brought before me twice. On the first occasion, I did not think the affidavits of the defendants satisfactory. Further affidavits were then filed on both sides. Now, the act is imperative, that a dividend shall not be paid unless the works are complete within a limited time. Taking it that I have a right to exercise some discretion, I have attended to the case to see whether I could safely abstain from exercising the authority of the Court to restrain the payment of the dividend which has been declared, and I should have been glad if I could have come to that conclusion. The affidavits of the defendants are not satisfactory, they do not of themselves satisfy me; but taken in conjunction with the affidavits on the other side, they do not answer them, and certainly are not satisfactory. The defendants say that they have funds applicable for the purpose; but the matter is not brought so fully or fairly forward as it ought to be. They say, "strike off everything which is objected to, and there still will be sufficient;" but however that may be I do not know it, and they have declined to give any explanation in answer to the affidavits of the plaintiff; and that being so, the defendants are necessarily subject to the imputation that they cannot explain it. The question is, not whether somehow or other there are not funds sufficient, but whether, acting fairly to all parties and taking into consideration everything, there are funds clearly applicable for this purpose, or which may be collected, to enable them to complete the works. The plaintiff in his affidavit says, that he believes that the company have exhausted all their capital applicable for making the line, and that an application to parliament for powers to raise additional capital is now pending. If the company

will produce their books, or such further evidence as they have, I will attend to any application on their behalf; but as the matter now stands, I must grant the injunction.

WIGRAM, V.C. }
March 20, 27. } DOBSON v. LAND.

Mortgagor and Mortgagee—Insurance by Mortgagee—Premiums.

A mortgagor covenanted with the mortgagees to insure the mortgaged premises against fire in their joint names. After his decease the mortgagees entered into possession, and insured the premises:—Held, that they were not entitled, as a matter of course, to add the amount of the premiums for such insurance to the mortgage debt, and charge it against the mortgaged premises.

Exceptions to the Master's report.

The bill in this suit was filed by mortgagees in possession against the persons claiming through the mortgagor, for foreclosure of mortgaged premises, consisting of certain messuages, mills, warehouses, and machinery. Three several sums of 1,400*l.*, 3,000*l.*, and 1,600*l.* were respectively secured thereon by three several mortgages executed respectively in 1817, 1819, and 1824. The mortgagor covenanted by every deed to insure the premises in the joint names of himself and the mortgagees, and the deed of 1819 also contained a proviso, that in case the mortgagees should at any time during the continuance of the security advance and pay the premiums and duty for the insurance, such payments should be a charge upon the mortgaged premises. The mortgagor died in 1825, and the mortgagees entered into possession in the following year.

At the hearing of the cause the usual reference was ordered to take the accounts. The plaintiffs claimed before the Master a sum for premiums paid by them for the insurance of the premises since the mortgagor's death. The policies were not produced, and the Master only allowed one-half of the claim, upon the ground that they were authorized by the proviso

in the deed of 1819 (whereby half the mortgage debt was incurred) to charge the premiums of insurance on the mortgaged premises, but were not authorized to do so by either of the other deeds.

Various exceptions were taken to the report of the Master. The plaintiffs excepted in respect of the non-allowance of the whole of the premiums paid by them; and the defendants entitled to the equity of redemption objected, by their fifth exception, to the allowance of any portion of the premiums to the plaintiffs.

This exception was based upon two grounds: first, that from the non-production of the policies in the Master's office, it did not appear that the mortgagees had insured the premises in the joint names of themselves and the mortgagor; and, secondly, that the mortgagees could not, without special contract with the mortgagor, insure the mortgaged premises in their own names and add the premiums to the mortgage debt.

The production of the policies at the hearing of the exceptions was not allowed, as they had not been produced in the Master's office.

Mr. Kenyon Parker and *Mr. Hardy* appeared for the plaintiffs, the mortgagees.

The Solicitor General and *Mr. Batten*, for the defendants entitled to the equity of redemption.

Mr. Wood, *Mr. M. A. Shee*, and *Mr. Torriano*, for the other defendants, supported the Master's report in respect of the allowance of one-half of the plaintiffs' claim.

In support of the fifth exception of the first-mentioned defendants, it was contended that a mortgagee in possession had not any right to charge the mortgaged premises with premiums for insurance against fire, if the mortgagor had not expressly agreed to such charge; and that in the present case, assuming that the mortgagees had insured in their own names, they had effected the insurance in such a manner that if the premises should have been burnt down, they might have put the whole of the sum recovered from the office into their own pockets, and still have proceeded against the mortgagor for their debt

and interest. In this respect the position of the mortgagees was analogous to that of landlord and tenant, where either might insure the premises without being accountable to the other for the sum recovered under such insurance.

The following cases were cited in support of their argument—

Brown v. Quilter, Ambl. 619.

Hare v. Groves, 3 Anst. 687.

Holtzapffel v. Baker, 18 Ves. 115.

Leeds v. Cheetham, 1 Sim. 148; s. c. 5 Law J. Rep. Chanc. 105.

Mason v. Sainsbury, 2 Marshall on Insurance, p. 794, (1st edit.); 796, (3rd edit.)

For the mortgagees it was argued that by taking possession of the mortgaged premises, they had changed their previous relationship to the mortgagor. In *Leith v. Irvine* (1) Lord Brougham had defined a mortgagee in possession to be "a bailiff without a salary, accountable to the mortgagor, but not paid by him." Although only a *quasi* owner in equity, he was absolute owner at law, and might do every thing which a prudent owner would have done. The principle upon which the premiums for insurance against fire were claimed was analogous to, if not identical with, that upon which a mortgagee was entitled to add to his mortgage debt sums paid by him for fines, premiums, foregifts, &c. on renewal of leases of premises in mortgage. A mortgagee in possession might pull down ruinous and build new cottages, make improvements and add the amount of such outlay to the principal. He would be allowed the expenditure for any act whereby the mortgaged property had been ameliorated at his expense, and would be entitled to be repaid with interest all sums laid out in the prudent management of the estate, but would be liable to a decree for wilful default in case of gross mismanagement — *Godfrey v. Watson* (2), *Hardy v. Reeves* (3), *Detillin v. Gale* (4), *Quarrell v. Beckford* (5), *Davis v. Dendy* (6),

(1) 1 Myl. & K. 286.

(2) 3 Atk. 517.

(3) 4 Ves. 466.

(4) 7 Ibid. 583.

(5) 1 Madd. 269.

(6) 3 Ibid. 170.

Sandon v. Hooper (7), *Dryden v. Frost* (8), *Russel v. Smithies* (9), *Hughes v. Williams* (10), *Wragg v. Denham* (11), and *Moore v. Painter* (12). The mortgagees had only an insurable interest through the act of the mortgagor. They were, therefore, trustees for him, and must account for any benefit produced by or in consequence of his act. A mortgagee or tenant of renewable leaseholds obtaining a renewed lease, was a trustee of the renewed lease for the mortgagor or lessor; and the mortgagees in the present instance could not have retained as against the mortgagor the sum which they might have received from the insurance office in case of fire. The case of landlord and tenant was not applicable to the present case, because there was not any privity of account between them—*Giddings v. Giddings* (13), *Webb v. Lugar* (14), *Ex parte Andrews re Emmett* (15), *Baldwin v. Banister* (16), *Holland v. Smith* (17).

March 27.—WIGRAM, V.C.—In the absence of the policies of insurance which have not been produced either in the Master's office or before me, the question raised by the fifth of the exceptions taken by the defendants to the Master's report is, if a mortgagee of houses not entitled by express contract with the mortgagor to insure the premises against fire at the mortgagor's expense, nor entitled to require the mortgagor to insure them against fire, thinks proper, without the privity of the mortgagor, to insure the premises against fire, whether in such a case a mortgagee is entitled, as a matter of course, to add the premiums of the policies to his mortgage

(7) 6 Beav. 246; s. c. 12 Law J. Rep. (n.s.) Chanc. 309.

(8) 3 Myl. & Cr. 670; s. c. 8 Law J. Rep. (n.s.) Chanc. 235.

(9) 1 Anstr. 96.

(10) 12 Ves. 493.

(11) 2 You. & C. 117; s. c. 6 Law J. Rep. (n.s.) Ex. Eq. 38.

(12) 6 Jurist, 903.

(13) 3 Russ. 241.

(14) 2 You. & C. 247; s. c. 6 Law J. Rep. (n.s.) Ex. Eq. 49.

(15) 2 Rose, 410

(16) 3 P. Wms. (Cox's edit.) 251, note (A) to *Robinson v. Pett*.

(17) 6 Espin. 11 (referred to by Sir E. Sugden in *Phillips v. Eastwood*, Lloyd & Gould, 289.)

debt, and charge them against the mortgaged premises.

In the case before me the mortgagees are entitled by contract in certain events to charge the premises with premiums of insurance against fire; but as the policies have not been produced, I am not at present in a condition to determine whether the insurances effected are within the terms of that contract, and, therefore, I am compelled at present to try the question in the abstract.

Now, in the absence of authority, I certainly think the rule ought to be against the right of the mortgagees to make such a charge. It was admitted in argument that if the mortgagees had a right to make this charge, the mortgagor must have had a corresponding right to require that the sums payable on the policies, in case the property had been destroyed by fire, should be laid out in restoring the premises; and the question was argued in that view of the case. The argument for the mortgagees was, that they were trustees for the mortgagor, and that they had no insurable interest in the property, except that which the mortgage gave them; and on these premises the conclusion was rested that whatever they did as mortgagees must enure for the benefit of the mortgagor, subject to the payment of the mortgage debt. In the absence of authority, I am not prepared to adopt that conclusion. I must observe that I do not see how the question could be affected by the circumstance that the mortgagees were in possession.

Now, that a mortgagee is, in some sense, a trustee for the mortgagor, may be admitted; for the person, in whom the legal estate is vested, with a beneficial interest in another person, is, in a sense, a trustee for that person. In some sense a mortgagee is in a worse position than a trustee: for a trustee, in an ordinary case, is not liable to a decree for wilful default, unless a special case be proved against him; whereas, such a decree is always as of course, against a mortgagee in possession. On the other hand, a trustee can never take a benefit to himself by any dealing with the trust property. But if a second mortgagee should buy in the first mortgage for half its amount, or even obtain an assignment of it without consider-

ation, I can have no doubt he would be entitled to charge the mortgagor with the full amount of the first mortgage, in addition to his own. Other cases of a like kind might be put. This destroys the integrity of the proposition contended for by the mortgagees; and I confess I have great difficulty in seeing why a mortgagee, as between himself and the mortgagor only, should not be allowed to make any contract he pleases, collateral with, and not affecting the mortgaged premises, just as a lessor or lessee may insure the leasehold property as against the other, but without giving any interest in the policy. Questions may arise with the insurance offices, but that is foreign to the matter in hand.

Two cases, however, were cited which, it was said, were authorities in support of the claim of the mortgagees. Those cases were *Ex parte Andrews in re Emmett and Baldwin v. Banister*. In respect of the former, Sir Thomas Plumer certainly, in the first part of his judgment, uses expressions favourable to the claim of the mortgagees, but ultimately he declines to decide the case on that ground, and he rests his judgment on the ground of trust. Upon looking at the case, it will be found that the transaction was in terms a trust, and not a mortgage. The other case is, I admit, more difficult to be got over. It might be distinguished from the present case on the ground that the purchase of the right to dower of the mortgagor's widow was dealing with the mortgaged property itself; but I do not think that is a distinction in principle. The case is very shortly stated, and no light is thrown upon it by the Registrar's book. Neither the argument of counsel nor the judgment of the Court appears. I cannot deny that I consider the case an authority adverse to my own view; but I cannot follow it without deciding in effect that a mortgagee is, to all intents and purposes, a trustee for the mortgagor, and subject to the same rules upon which the Court restrains persons filling a fiduciary character from having any dealings for their own benefit. The principle upon which that doctrine is founded, does not apply to the case of mortgagor and mortgagee; and I have already shewn that it is not so applied by the Court.

The decree ordered a reference back to the Master to inquire into and state the provisions of the policies of insurance, with liberty to receive further evidence in respect of them, and to state special circumstances. No order upon the exceptions as to the premiums.

WIGRAM, V.C. }
Jan. 11, 12. } ORD v. FAWCETT.

Production of Documents.

Where the entries in the trade books of a defendant may shew the infringement by him of an alleged custom for the benefit of the plaintiff, the Court will order the production of the trade books for the inspection of the plaintiff before the hearing, and before the existence of the custom has been proved, notwithstanding the existence of such custom is denied by the answer of the defendant.

This was a motion for the production of documents admitted by the answer of the defendant to be in his possession. The plaintiffs by their bill alleged the existence of a certain custom, whereby all corn grown within the soke or district of Wakefield was bound to be ground at their ancient mill: and after stating that the defendant, a corn-merchant and master miller, occupied a farm in the above soke or district, and had caused corn grown there to be ground at a mill other than that of the plaintiffs, prayed for an account of all the flour sold by him within a certain time. The books required to be produced consisted of two bought day books, containing entries of corn, &c. bought by the defendant in his business of corn-merchant and master miller, with the prices and names of the sellers; two bought ledgers, containing entries of goods posted from the bought day books; three mill-receiving books, containing entries of goods received into the defendant's mill; four sale ledgers, containing entries of goods sold by the defendant, posted from day-books of goods sold by him; three cash-books, containing entries of monies received and paid by him; and various other books, &c. used by the defendant in his trade or business of corn-merchant and master miller.

Mr. E. Rodwell, for the motion, cited *Lancaster v. Evors* (1).

Mr. Chapman Barber, for the defendant, contended that the plaintiffs were not entitled to the production of the books, &c., as they had not proved the existence of the alleged custom. The defendant in his answer denied the existence of the custom, and swore that the value of the corn, flour, &c. sold by him to residents within the district claimed to be subject to the alleged custom, did not amount to one eightieth part of the corn, flour, &c. the particulars of which were entered in the books required to be produced. Independently of the inconvenience of producing trade books, it might be injurious to him in his business to disclose the names of his customers to rivals in business. The defendant had offered by his answer to pay to the plaintiffs the sum of 200*l.* when the alleged custom should be proved, and he swore that such sum exceeded what they would be entitled to recover from him if the custom should be proved.

He cited—

Adams v. Fisher, 3 Myl. & Cr. 526;
s. c. 7 Law J. Rep. (N.S.) Chanc. 289.
Combe v. the Corporation of London, 15
Law J. Rep. (N.S.) Chanc. 80.
Airey v. Hall, 12 Jurist, 1043.

Mr. Rodwell replied.

Jan. 12.—WIGRAM, V.C.—I am of opinion that in this case as it stands before me now, the order must be made for production. In making this order I am not touching the case of *Adams v. Fisher*. There the plaintiff contended that he was interested in certain accounts, and moved for the production of certain papers; the Lord Chancellor (Cottenham) said, it was impossible that any of those papers could help him to prove his title to an account from the defendant, and refused to order production. But here, the object is to prove two things: first, the custom; and secondly, that it has been infringed by the defendant. The entries in the trade books of the defendant may shew that during the whole time to which they apply, part only and not the

(1) 1 Phil. 349; s. c. 16 Law J. Rep. (N.S.) Chanc. 308; 13 *Ibid.* 269.

whole of the corn grown within the district with reference to which the plaintiffs' claim is made, and ground for the defendant, was ground at the plaintiffs' mill; and may shew that part of such corn was ground at other mills. Without saying anything as to the custom, it seems to me that there is sufficient to entitle the plaintiffs to production of the books and documents asked for. I shall, therefore, make the usual order for their production. The defendant to be at liberty to file an affidavit to enable him to seal up such parts of the books as have no relation to the corn and flour in question, and the production of them to be at the office of the solicitor in the country.

V.C. { THE KING OF THE TWO SICILIES
April 24; v. THE PENINSULAR AND
May 22. { ORIENTAL STEAM-PACKET
COMPANY.

Ship and Shipping—Fraud under Ship Registry Act and Foreign Enlistment Act—Corporation—Indictment.

During the rebellion in Sicily two foreigners were sent to England by the usurping government to purchase a vessel from the defendants. The vessel was registered in the name of the company, and a bill of sale was then executed to two persons alleged to be trustees for the foreigners. The plaintiff, upon being restored to his government, filed a bill to restrain the company from parting with the vessel upon the ground that the purchase-money was taken from his royal treasury. The bill alleged that the company had entered into a scheme with the two foreigners for the purpose of evading the provisions of the Ship Registry Act. The company demurred, on the ground that by answering the bill they would expose themselves to pains and penalties under the Ship Registry Act, and to an indictment under the Foreign Enlistment Act. Demurrer overruled.

Held, that a corporation cannot be indicted under the Foreign Enlistment Act.

The bill in this case will be found fully set forth (*ante*, p. 202). The case then came before the Court upon motion to dissolve an injunction granted, on behalf

of his Majesty the King of the Two Sicilies, to restrain the defendants, the Peninsular and Oriental Steam Packet Company, from delivering up a vessel called the *Bombay*, which had been purchased by two persons named Granatelli and Scalia, who had been sent over to this country for that express purpose at the time of the late revolution in Sicily by the usurping government. The case also came on to be heard upon the demurrer of two persons named Wilcox and Moody, in whose names the vessel had been registered under the Ship Registry Act. The injunction was dissolved and the demurrer overruled. The cause now came on upon the demurrer of the Peninsular and Oriental Steam Packet Company by their chairman, Brodie M'Ghee Wilcox, and their secretary, Charles Wellington Howell, and for cause of demurrer shewed that it appeared from the plaintiff's own shewing in his bill, that the discovery sought from these defendants by that part of the bill to which they demurred might subject the defendants to pains and penalties and to criminal prosecution, in respect of the matters in that part of the bill mentioned. To the residue of the bill, which was not demurred to, the defendants had put in their answer.

Mr. Stuart, Mr. Chandless, and Mr. Willes appeared in support of the demurrer.—The bill alleged that two foreigners named Granatelli and Scalia, had purchased the vessel called the *Bombay* from the defendants, the Peninsular and Oriental Steam Packet Company with money taken from the royal treasury at Palermo, and that the said defendants, knowing by whom and with what money the vessel had been purchased, had entered into a scheme at the request of such foreigners for the purpose of assisting them to obtain possession of the vessel, and had in pursuance of such scheme caused the said vessel to be registered in the name of the company as the owners thereof, and that the company had afterwards caused a bill of sale to be executed to two English persons named Wilcox and Moody, who were well known by the company to be agents for the two foreigners who had, in fact, paid the money for the purchase of the vessel out of monies taken from the plaintiff's royal treasury. The bill alleged that the

Bombay before the same was so far completed that it could be registered, had ceased to belong to the company, and had never, since a time anterior to the registry thereof, belonged to any persons being subjects of Great Britain, or otherwise entitled to the benefit of the Act for the Registration of British Vessels; and that the registering the said ship and the causing the particulars of the subsequent bills of sale to be entered were acts in fraud of the provisions of such act of parliament, and in violation of the just rights of the plaintiff, whose monies had, without his consent, been invested in the said ship. It was contended that, if the company were to answer these allegations, they would expose themselves to pains and penalties under the Ship Registry Act, 8 & 9 Vict. c. 89. ss. 5, 12, 13. (1). For, although there was nothing to prevent a British ship being sold to a foreigner, still the bill alleged that the ship had been registered in the names of British subjects for the purpose of defeating the rights of the plaintiff, and

that consequently a fraud had been committed against the act, which would be a crime punishable at common law. It was also contended, that the company by answering the allegations in the bill would render themselves liable to an indictment under the Foreign Enlistment Act, 59 Geo. 3. c. 69. s. 7. (2); because, if the

(1) Sect. 5. "That no ship or vessel shall be registered, or having been registered shall be deemed to be duly registered by virtue of this act, except such as are wholly of the build of the said United Kingdom or of the Isle of Man, or of the Islands of Guernsey or Jersey, or of some of the colonies, plantations, islands, or territories in Asia, Africa or America, or of Malta, Gibraltar, or Heligoland, which belonged to Her Majesty, her heirs or successors, at the time of the building of such ships or vessels or such ships or vessels as shall have been condemned in any Court of Admiralty as prize of war, or such ships or vessels as shall have been condemned in any competent court, as forfeited for the breach of the laws made for the prevention of the slave trade, and which shall wholly belong and continue wholly to belong to Her Majesty's subjects duly entitled to be owners of ships or vessels registered by virtue of this Act."

Sect. 12. "That no person who has taken the oath of allegiance to any foreign state, except under the terms of some capitulation, unless he shall afterwards become a denizen or naturalized subject of the United Kingdom by Her Majesty's letters patent, or by act of parliament, nor any person usually residing in any country not under the dominion of Her Majesty, her heirs and successors, unless he be a member of some British factory, or agent for or partner in any house or copartnership actually carrying on trade in Great Britain or Ireland, shall be entitled to be the owner, in whole or in part, directly or indirectly, of any ship or vessel required and authorized to be registered by virtue of this act."

NEW SERIES, XIX.—CHANG.

(2) Sect. 7. "And be it further enacted, that if any person within any part of the United Kingdom, or in any part of his Majesty's dominions beyond the seas, shall, without the leave and licence of his Majesty for that purpose first had and obtained, as aforesaid, equip, furnish, fit out, or arm, or attempt or endeavour to equip, furnish, fit out, or arm, or procure to be equipped, furnished, fitted out, or armed, or shall knowingly aid, assist, or be concerned in the equipping, furnishing, fitting out, or arming of any ship or vessel with intent or in order that such ship or vessel shall be employed in the service of any foreign prince, state, or potentate, or of any foreign colony, province, or part of any province or people, or of any person or persons exercising or assuming to exercise any powers of government in or over any foreign state, colony, province, or part of any province or people, as a transport or store-ship, or with intent to cruise or commit hostilities against any prince, state, or potentate, or against the subjects or citizens of any prince, state, or potentate, or against the persons exercising or assuming to exercise the powers of government in any colony, province or part of any province or country, or against the inhabitants of any foreign colony, province, or part of any province or country, with whom his Majesty shall not then be at war, or shall within the United Kingdom, or any of his Majesty's dominions, or in any settlement, colony, territory, island, or place belonging or subject to his Majesty, issue, or deliver any commission for any ship or vessel, to the intent that such ship or vessel shall be employed as aforesaid, every such person so offending shall be deemed guilty of a misdemeanour, and shall, upon conviction thereof, upon any information or indictment be punished by fine and imprisonment, or either of them, at the discretion of the Court in which such offender shall be convicted, and every such ship or vessel, with the tackle, apparel, and furniture, together with all the materials, arms, ammunition, and stores which may belong to or be on board of any such ship or vessel, shall be forfeited; and it shall be lawful for any officer of his Majesty's Customs or Excise, or any officer of his Majesty's navy, who is by law empowered to make seizures for any forfeiture incurred under any of the laws of Customs or Excise, or the laws of trade and navigation, to seize such ships and vessels aforesaid, and in such places and in such manner in which the officers of his Majesty's Customs or Excise and the officers of his Majesty's navy are empowered respectively to make seizures under the laws of Customs and Excise, or under the laws of trade and navigation, and that every such

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allegations in the bill were true, the company would have been concerned in furnishing and fitting out a ship which was to be employed in the service of persons who intended to commit hostilities against a power with whom Her Majesty was not at war, and a defendant could not be compelled to answer, when by answering he would subject himself to punishment.—

Thorpe v. Macauley, 5 Madd. 218.

Lee v. Read, 5 Beav. 381; s. c. 12

Law J. Rep. (N.S.) Chanc. 26.

Earl of Lichfield v. Bond, 6 Beav. 88;

s. c. 12 Law J. Rep. (N.S.) Chanc. 329.

Mitchell v. Koecker, 11 Beav. 380.

Paxton v. Douglas, 19 Ves. 225.

Mr. Bethell and *Mr. Goldsmid*, in support of the bill, contended that the company could not incur any punishment under either of the acts cited by answering the allegations in the bill. The 48th section (3) of the Ship Registry Act provided a penalty of 500*l.* for making any false declaration under the act, and no further punishment could be inflicted by any proceedings at common law against the company. It was expressly provided by the same section that the person or persons making the false declaration should be the person or persons to suffer the penalty. Now, there was nothing in the allegations of this bill to shew that any officer of the company made the declaration alleged to

ship and vessel, with the tackle, apparel, and furniture, together with all the materials, arms, ammunition, and stores which may belong to or be on board of such ship or vessel, may be prosecuted and condemned in the like manner and in such courts as ships or vessels may be prosecuted and condemned for any breach of the laws made for the protection of the revenues of Customs and Excise or of the laws of trade and navigation."

(3) Sect. 48. "That if any person or persons shall falsely make declaration to any of the matters hereinbefore required to be verified by declaration, or if any person or persons shall counterfeit, erase, alter, or falsify any certificate or other instrument in writing required or directed to be obtained, granted or produced by this act, or shall knowingly or wilfully make use of any certificate or other instrument so counterfeited, erased, altered, or falsified, or shall wilfully grant such certificate or other instrument in writing, knowing it to be false, such person or persons shall for every such offence forfeit the sum of 500*l.*"

be false, and therefore there was nothing to shew that any of the defendants were liable under the act; but as regarded these defendants being a corporation they could not be indicted on the grounds alleged. There was no instance of a corporation ever having been indicted, except in a case of misfeasance for the non-repair of a road—*The Queen v. the Inhabitants of Heage* (4). The only method of punishing a corporation was by fine, for the purpose of compelling them to do an act; but you could not imprison a corporation, and there was no other punishment that could be inflicted. As to the act of the company being in contravention of the Foreign Enlistment Act, it was contended that there was no allegation that the vessel was to be used for war purposes; but, on the contrary, it was expressly stated in the agreement set forth in the bill, "that if any alteration should be required for war purposes the alteration was to be made at the expense of the purchasers."

Mr. Stuart, in reply, submitted that the company could not be compelled to answer if by their answer they should subject themselves even to the penalty of a fine under the act. There was a distinct allegation that a false certificate had been made by the company, and there was a distinct punishment provided by the act for a crime of that nature.

May 22.—The VICE CHANCELLOR.—I thought it necessary, owing to the length of the demurrer, to read through the whole of the bill. There are a number of small points adverse to the demurrer. For instance, one of the interrogatories in the bill to which the defendants have demurred is, whether the city of Palermo is not in the island of Sicily. I cannot conceive how the answer to this can subject the defendants to pains and penalties; but the case must, in fact, be considered upon the principal points raised, which are these: first, whether the defendants, the Steam Packet Company, would, by answering, expose themselves to pains and penalties

(4) 2 Q.B. Rep. 128; s. c. 10 Law J. Rep. (N.S.) M.C. 145.

under the Ship Registration Act; and secondly, whether they would also render themselves liable to such penalties under the Foreign Enlistment Act. Upon the first question I certainly do not see any ground for the demurrer. I am not prepared to say no fraud has been committed upon the act; but my opinion is that there is no such fraud charged upon the bill: consequently, upon the first point the demurrer must be overruled. Then, as to the other question, whether the defendants would expose themselves to penalties under the Foreign Enlistment Act in having supplied foreigners with ships of war, and whether there is anything upon this subject in the bill which renders it necessary for the defendants to protect themselves by demurring from answering. The principal argument pressed upon me was, that the company would, if they answered the bill, be liable to an indictment. It is true that in some cases a corporation is liable to be indicted, as, for instance, in the case which has been cited, where there had been non-compliance with an order of the Justices, requiring that a certain bridge should be repaired; but such cases are of a limited description, and not inconsistent with the general principle, that by the law of England corporations are not liable to indictments. Since the case was argued, I have had the opportunity of consulting one of the Judges upon this point, who has coincided with my own view of the law. I do not, therefore, think it can be made out that the company could be indicted under the Foreign Enlistment Act. My opinion is also confirmed by the language of the act itself, which clearly refers to individuals; the word "he" is used repeatedly in several sections, and it is evident that the intention of the act was to prevent private individuals from giving aid to foreigners at the hazard of involving this country in a war with other nations; and I do not see any expressions which can lead to the supposition that the act was intended to apply to persons sustaining a corporate capacity. Under these circumstances, the demurrer must be overruled.

WIGRAM, V.C. }
April 25 ;
May 2. }

DAVEY v. PLESTOW.

Administration of Estate—Creditors' Suit—Staying Proceedings—Costs.

Where a decree for the general administration of an estate has been made, and the Court upon that ground restrains the proceedings in another (a creditors') suit, the question of payment of the costs of the plaintiff in such creditors' suit will be reserved, if the debt be disputed by the executors.

The case of West v. Swinburne (1) explained.

This was a motion, on behalf of the defendants, the executors of a deceased testator, to stay the proceedings in the plaintiff's suit, a creditors' suit. A decree for administration of the testator's estate had been obtained in a previous suit. The executors admitted assets, but denied that the plaintiff's claim was a debt due from the testator. The plaintiff asked for the costs of her suit.

Mr. Twells, for the motion, submitted that as the debt was disputed, the plaintiff was not entitled to an order for immediate payment of her costs. It might turn out that the plaintiff had not any foundation for commencing her suit. At all events, there was an opportunity of proving the alleged debt under the decree in the former suit.

Mr. W. Morris, for the plaintiff, cited *West v. Swinburne* (1).

Mr. Twells replied.

May 2.—WIGRAM, V.C.—I should not have had any doubt in this case if it had not been for the case of *West v. Swinburne*, before the Vice Chancellor Knight Bruce, in which he thought it necessary to ask for the certificate of the Registrars as to the costs. The certificate upon the first impression is as to what costs should be paid; but on looking into the case, it appears that the party applying did not admit that

(1) *Ante*, p. 81.

any debt was due. I confess I do not see any difference between not admitting a debt and disputing a debt; because, if it is not admitted, the same proof of it is required as if it was denied. Upon applying to the Vice Chancellor Knight Bruce, it appears that he had not this point in his mind. I therefore mentioned the case to the Registrars, and inquired whether they meant to certify that the payment of costs was the price for the injunction, if the debt should or not be due; or, whether their certificate only applied to those costs which the plaintiff might be entitled to receive independently of that question. They have informed me that they only meant to state what costs he was entitled to receive, if he was entitled to receive any; but that when the debt was disputed they thought the costs ought to be reserved, because, if there was no debt, the suit would fail; and that the only ground upon which the Court interfered was, that the executor ought not to be vexed by two suits for the same object. In the present case, therefore, I shall make the usual order for staying the proceedings in the plaintiff's suit, and reserve the question of costs.

WIGRAM, V.C. }
 May 7, 8; } MARKER v. KEKEWICK.
 June 10. }

Settlement—Construction—Charge when raiseable—Tenant for Life and Remainderman—Trustees' Discretion.

Estates were limited by settlement to the use of trustees for a term, upon trust, in the first place by cutting, &c. and converting into money certain timber, or by demising, mortgaging, or selling the settled estates, or by any other reasonable means to raise certain charges; and subject to the term, the estates were limited to the use of several successive tenants for life, without impeachment of waste, with divers remainders over in tail. The trustees proposed to raise the charges by mortgage of the estates, without resorting to the timber:—Held, on demurrer to bill filed by remainder-man to restrain the trustees from so doing, that the course about

to be adopted by them was right; that, as between the tenant for life and the remaindermen, the former was to keep down the interest and the corpus of the estate to bear the charges; and that the tenant for life, being unimpeachable for waste, was entitled, as part of the profits of the estate, to the timber which he had a right to cut.

The bill was filed by the tenant in tail in remainder, under a settlement of the 11th of October 1844, against the surviving tenant for life of the premises comprised in the settlement, the persons interested in certain charges thereon created by the settlement, and the trustees of a term for raising such charges. By the indenture of settlement, certain real estates consisting, amongst other hereditaments, of a mansion-house and pleasure grounds, near Combe, in the county of Devon, were limited to the use of the defendants, the trustees, for a term of 1,000 years, without impeachment of waste, except for cutting ornamental timber, and subject thereto to the use of several successive tenants for life, with divers remainders over in tail. The trusts of the term were declared to be, in the first place, by cutting, felling and selling, and converting into money all or any part of the timber then standing on the settled lands, which was of full and ripe growth, and not ornamental to the mansion at Combe, or the pleasure grounds attached to it, or any of the views or prospects of it, (of which timber it was declared, that enough of the most ornamental should always remain to preserve the beauty of the place unimpaired,) or by demising, mortgaging, or selling the premises, or any part or parts thereof comprised in the term, (except the mansion-house at Combe,) for all or any part of the term, or by all or any of the said, or any other reasonable ways or means, forthwith to raise three several sums of 10,000*l.* each. The settlement contained the usual proviso for cesser of the term, and declaration that it should attend the inheritance in respect of such of the premises, if any, as should be mortgaged under the above powers.

The bill stated that there was then standing and growing on the premises a large

quantity of timber of ripe and full growth, not being ornamental timber, of the value of 7,000*l.* and upwards to sell; and charged that the trustees were about to raise the three several charges by sale or mortgage of a sufficient part of the premises without resorting to cutting or felling any of the timber, unless in case of deficiency of the proceeds of such sale or mortgage for the above purposes, and that if they were permitted so to do, the inheritance would be thereby unnecessarily burdened, and the tenant for life would be benefited at the expense of the inheritance to the amount of 7,000*l.* and upwards. It then prayed a declaration that the remainder-men were entitled to have all the said timber, not being ornamental, cut and sold, and the proceeds applied towards payment of the said charges, in exoneration so far as they would extend of the corpus of the settled estates from those charges; and that the trustees were not entitled to raise the whole of the charges by way of mortgage, without resorting to the timber; and for an injunction to restrain them from raising the whole or any part of the charges until they had cut and sold the timber and applied the proceeds towards payment thereof; or at all events, to restrain them from raising by way of mortgage any greater sum than the difference between the then value of the timber and the amount of the charges.

The tenant for life and the trustees severally demurred to the bill.

The Solicitor General, Mr. Lloyd and *Mr. Giffard* appeared for the tenant for life; and—

Mr. Roundell Palmer and *Mr. Amphlett*, for the trustees, in support of the respective demurrers.

Mr. Wood and *Mr. Sandys*, for the plaintiff, opposed the demurrers.

The following were the principal cases cited:—

- Maddison v. Andrew*, 1 Ves. sen. 57.
- Gower v. Mainwaring*, 2 Ibid. 87.
- Brown v. Higgs*, 8 Ves. 561.
- Burges v. Lamb*, 16 Ibid. 174.
- Cowley v. Hartstonge*, 1 Dow, 378.
- Davies v. Wescomb*, 2 Sim. 425.

Tooker v. Annesley, 5 Sim. 235.

Piper v. Piper, 3 Myl. & K. 159.

Ferrand v. Wilson, 4 Hare, 344; s. c. 15 Law J. Rep. (N.S.) Chanc. 41.

Fordyce v. Bridges, 2 Ph. 497; s. c. 16 Law J. Rep. (N.S.) Chanc. 81;

17 Ibid. 185.

June 10.—WIGRAM, V.C. delivered out the following judgment to the parties.—My opinion as to the proper conclusion to be come to on these demurrers has undergone no change from the moment I felt that I was in possession of the real question raised by the pleadings. In order to explain my views, the case must be noticed under two different aspects: first, as between the parties entitled to the charges created by the settlement of the 11th of October 1844 on the one side, and the persons entitled to the estates subject to the charges on the other; and secondly, as between the tenant for life of the estates subject to the charges on the one side, and the parties entitled in remainder on the other. The former of these questions may be dismissed with a passing observation. It is only for the sake of giving distinctness to the latter question, that it requires even such an observation. It is admitted on all hands, that the parties entitled to the charges have *prima facie* a right to have those charges raised in the manner most beneficial to themselves. The limits, if any, of this right must be found in the obligation which this Court in some cases imposes, in compelling parties to exercise their paramount rights in the manner least injurious to others: as, for example, in the case of marshalling assets and some cases of contribution. The argument, therefore, in this case was properly confined to the latter question. It was said for some of the demurring parties, that the trustees had an unlimited discretion to raise the charges in such way as they thought fit, and that, if their discretion were but honestly executed, the Court would leave the charges to be finally borne by those parties upon whom the mere act of the trustees might chance to throw it; and the case of *Brown v. Higgs* and other cases of that class were cited in support of the argument. It was this

argument which for the moment embarrassed me. I felt satisfied that it could not be sound; and assuming that the case of the defendants might require my adoption of the argument, I did not at once see my way to the conclusion which I am about to state. If the argument were right, the trustees, by postponing the raising of the charges until after the death of the tenant for life, might throw the whole burthen of principal and interest upon the inheritance; or, by entering into possession of the estates in the first instance and collecting the rents and profits, including the timber which the tenant for life *sans* waste might cut, they might deprive the tenant for life of all benefit under the settlement; or, by pursuing the course which it is the object of this bill to restrain, namely, by raising the charges immediately by sale or mortgage, they might apportion the charges between the tenant for life and remainder-man in proportion to their respective interests in the estates. It is impossible that I can ascribe so capricious an intention to the settlor, unless the words of the settlement imperatively require it. Now, nothing can in my opinion be more clear than the intention of the settlor in this case as expressed in the settlement. She intended that her estates, in the first instance, should be subject to certain charges in favour of the persons to whom those charges are given; and subject to those charges, she has given her estates to a tenant for life unimpeachable for waste, with remainders over. All else in the settlement relating to the manner of raising the charges is mere machinery for carrying out the intentions I have described. It follows, that as between the tenant for life and the remainder-man, the tenant for life must pay the interest of the charges, and the corpus of the estate must bear the charges upon it. The tenant for life in the mean time is entitled, as part of the profits of the estate, to the timber which the tenant for life, not impeachable for waste, has a right to cut as between himself and the remainder-man. As the course about to be pursued by the trustees will do that which, as between the tenant for life and the remainder-man, I think is right, I need not say what course the

Court would take at the hearing of the cause if a different course had been pursued by the trustees. The cases cited from *Simons* are, I think, authorities in favour of this view of the case. The demurrers, therefore, must be allowed, in the usual way, unless the costs have been made matter of arrangement between the parties.

Demurrers allowed.

M.R. }
Jan. 12; } GREEDY v. LAVENDER.
July 2. }

Settlement—Wife's Equity—Reversionary Interest.

A husband and wife assigned a reversionary interest in trust funds belonging to the wife, as a security for money. The husband subsequently deserted his wife, and they both survived the tenant for life. Upon a petition by the wife,—Held, that she was entitled to a settlement, and that as between herself and her husband's assignee, her having committed adultery was immaterial, and did not deprive her of that right.

This was the petition of Martha Tratt, a married woman, by her next friend, praying that various sums of money to which she was entitled in reversion expectant upon the decease of Mary Adams, and which had fallen into possession during the life of herself and her husband, might be absolutely settled for her benefit.

Richard Adams, by his will, dated the 21st of May 1821, bequeathed unto John Lavender and James Churchill all his household goods, &c. for the benefit of his wife Mary Adams for life, and after her death upon the trusts thereafter mentioned. He also bequeathed unto John Lavender and James Churchill all his monies in the public stocks or funds, upon trust to raise and pay the sum of 1,000*l.* to his wife, and to pay the dividends of the residue to her for life, and after her decease upon the trusts thereafter mentioned. He also bequeathed to John Lavender and James Churchill a leasehold messuage and premises, upon trust for the benefit of his

wife for life, and after her decease upon trust to sell the same, and his household goods, &c., and to stand possessed of the money to arise therefrom, and also the residue of his stocks or funds, upon trust for his second cousins, the sons and daughters of his first cousins John Beck, William Beck, George Beck, Mary, the widow of Thomas Antiss, and Elizabeth, the wife of Mark Bullock, Hannah, the widow of James Antiss, and Elizabeth, late the wife of William Parrott, equally to be divided among them, share and share alike as tenants in common, to be an interest vested in them at their respective ages of twenty-one years.

The testator appointed Messrs. Lavender and Churchill his executors. He died on the 30th of August 1822, leaving Mary Adams his widow surviving, and his executors proved his will on the 18th of March 1823.

This suit was instituted for the administration of the testator's estate, by parties who claimed to be interested under the bequest made to his second cousins, and a decree was made referring it to the Master to take the usual accounts and make the common inquiries as to the parties entitled, and by his report he found that John Beck, one of the first cousins, had the following children living at the death of the testator: William Beck, Thomas Beck, John Beck, and Martha the wife of Samuel Tratt, and Elizabeth Beck, who attained the age of twenty-one, and had since died intestate, in consequence of which her share became divisible among her brothers and sisters.

The persons found to be entitled as children of the testator's first cousins named in the will amounted to fifteen.

By two several indentures of assignment, dated the 20th of March 1827 and the 16th of April 1827, each made between Samuel Tratt and Martha his wife of the one part, and William King of the other part, in consideration of various sums of money paid to them, Samuel Tratt and Martha his wife assigned all that fifteenth share of the money to which Martha Tratt was entitled under the will of the testator, and also the one-fourth of the share to which she was entitled as one of the next-of-kin of her sister Elizabeth Beck deceased, to

William King absolutely, subject to the life interest of Mary Adams, and also subject to the payment of 176*l.* to Joseph Tratt.

By an agreement, dated the 18th of September 1824, and made between Samuel Tratt and Martha his wife of the one part, and Joseph Tratt of the other part, Samuel Tratt and his wife agreed to mortgage her share of the monies under the testator's will to Joseph Tratt, to secure the repayment of the sum of 176*l.*; and by another agreement, dated the 17th of September 1827, and made between the same parties, Samuel Tratt and his wife, in consideration of a further sum of 8*l.* 13*s.*, agreed to pay all monies advanced to them by Joseph Tratt; and they directed the trustees of the testator's will to pay the same to Joseph Tratt.

By an indenture, dated the 10th of March 1832, after reciting that Samuel Tratt was indebted to Joseph Tratt in the sum of 300*l.*, Samuel Tratt and Martha his wife assigned all her interest in the said testator's estate unto Joseph Tratt, subject to the life estate of Mary Adams, to secure the repayment of the sum of 300*l.* with interest, which was composed of the sums secured by the agreement made on the 18th of September 1824, and the 17th of September 1827, and the interest due thereon, and also of monies subsequently advanced.

In 1834 Joseph Tratt deposited these several securities with Richard Kirkman Lane, who was a defendant to this suit, to secure 304*l.* 15*s.* which he claimed to be due to him from Joseph Tratt.

On the 22nd of December 1848 a decree was made under which the costs of the suit were paid, and a sum of money representing the share of Martha Tratt in the estate of the testator was carried to an account entitled "The account of Samuel Tratt and Martha his wife, Richard Kirkman Lane, and William King." And another sum representing the share of Elizabeth Beck, deceased, was carried to an account entitled "The account of John Beck, Samuel Tratt and Martha his wife, William King (who was also the assignee of William Beck's share), and Thomas Beck" (1).

(1) *Greedy v. Lavender*, 11 Beav. 417; s.c. 18 Law J. Rep. (N.S.) Chanc. 62.

Martha Tratt also stated in this petition that no settlement or agreement for a settlement had been made previously or subsequent to her marriage; that her husband Samuel Tratt had deserted her for near twenty years; that she had ever since been, and was then living separate, and was not and had not been in any manner maintained by him: and she asked that the whole or a competent part of the several funds to which she was entitled might be settled upon her.

Richard Kirkman Lane, in opposition to this petition, filed an affidavit stating that the petitioner for many years past had been, and then was, cohabiting with another man. The petitioner then made an affidavit stating that her husband was cohabiting with another woman.

Mr. Turner and *Mr. Sheffield*, for the petition.—This petition is presented by a married woman insisting upon her equity for a settlement. The interest was reversionary, and had been assigned by the husband and wife, but it had fallen into possession during the lives of both husband and wife—*Mitford v. Mitford* (2), *Purdew v. Jackson* (3), *Honnor v. Morton* (4), and *Stanton v. Hall* (5). But the petitioner in this case claims a larger share of the funds in consequence of being deserted by her husband.

Mr. Goodeve appeared for *Mr. Lane*.

Mr. Cankrien, for *W. King*.—The whole fund is claimed because the husband had deserted his wife about eighteen years since; but it is alleged that she deserted him and is living in adultery, and in such a case the Court never assists a wife to obtain a settlement—

Bullock v. Menzies, 4 Ves. 798.

Wright v. Morley, 11 Ibid. 23.

Eedes v. Eedes, 11 Sim. 570; s. c. 10

Law J. Rep. (N.S.) Chanc. 199.

Carr v. Eastabrooke, 4 Ves. 146.

Mr. Winstanley appeared for *Thomas Beck*.

(2) 9 Ves. 87.

(3) 1 Russ. 1; s. c. 4 Law J. Rep. Chanc. 1.

(4) 3 Russ. 65.

(5) 2 Russ. & M. 175; s. c. 9 Law J. Rep. Chanc. 111.

Mr. Turner, in reply.—The question is, whether a married woman has a right to a settlement against the assignee of her husband. The law gives the husband such property of the wife as he can reduce into possession; but there is a difference in equity. If he is obliged to come to this Court, equity will compel him to make a settlement. If he can reduce it into possession without coming to this Court, the wife's right is at an end. The wife's right to a settlement has not been intercepted by the assignment—*Sturgis v. Champneys* (6), *Elliott v. Cordell* (7), 1 *Roper's Husband and Wife*, p. 271, 2nd edit. The conduct of the husband has, by his own admission, been most improper, and if she has been driven into vice, that is no reason between herself and her husband's assignee why she should be deprived of her rights.

July 2.—The MASTER OF THE ROLLS.—The interest of Martha Tratt in these several funds was reversionary when the several agreements and assignments were executed. But, it was argued, because the husband and wife both survived the tenant for life, that the interest of the wife was bound, and ought to be made applicable to satisfy the claims of the assignees. The several cases cited do not appear to apply to the present case. There was no settlement made at the time of the marriage, or subsequent; and the wife has been deserted by her husband, who did not maintain her. By the affidavits made in opposition to this application, it is stated, that she had been living in adultery. By her affidavit she did not deny the imputation; but she stated that her husband had lived with another woman. But between the wife and the assignee of her husband these circumstances do not seem material. I am, therefore, of opinion that the wife is entitled to a settlement; and if the parties cannot agree, I must refer it to the Master to determine the amount, and approve of a proper settlement.

(6) 5 Myl. & Cr. 97; s. c. 9 Law J. Rep. (N.S.) Chanc. 10.

(7) 5 Madd. 149.

L.C. { *In re* THE VALE OF NEATH AND
March 3. { SOUTH WALES BREWERY COM-
 PANY, *ex parte* WHITE.

Company — Winding-up Act — Contributory—Husband of Female Shareholder—Transfer of Shares to the Company.

By the provisions of the deed of settlement of a company, the husband of a female proprietor might, with the approbation of the directors, become a proprietor; but if he did not intend to become such, he was to sell within six months after his title accrued, or in default the shares were to be forfeited; but in case he should not obtain the approbation of the directors to become a proprietor within the six months, the directors were empowered and required, on the application of the husband, to purchase the shares at the market price for the benefit of the company. The husband of a female shareholder attended a meeting of the company, and proposed certain resolutions thereat, and afterwards applied to the directors to purchase his wife's shares upon certain terms. The transaction was completed within six months after the title of the husband accrued:—Held, that the transaction was valid within the terms of the deed, and that the husband's liability, as a contributory, was properly qualified by restricting it to the period preceding the sale.

On the 11th of February a motion was made, on the part of the official manager of the Vale of Neath and South Wales Brewery Company, before Knight Bruce, V.C., that the decision of the Master, whereby the name of the respondent William M. White was included in the list of contributories of the said company, in right of his wife Mary White, a member or contributory in respect of seventy-two shares, with the following qualification, that the said W. M. White was only liable in respect of debts and losses (if any) up to the 11th of April 1842, might be reversed, and that the name of W. M. White might be included in the list of contributories of the said company, as a contributory in his own right in respect of the said seventy-two shares, without qualification.

NEW SERIES, XIX.—CHANC.

The Vice Chancellor confirmed the decision of the Master.

The official manager renewed his motion by way of appeal to the Lord Chancellor.

The following were the facts of the case, as appearing from the admissions and evidence.

In June 1840, Mary White, then Mary Davis, spinster, became proprietor of seventy-two shares; and duly executed the deed of settlement in respect of the same, but her name was never entered in the register-book in respect of these shares or any other shares. Mary Davis received the dividends payable in respect of these shares in September 1840, March 1841, and September 1841; and in January 1842 she married the respondent.

On the 5th of February the respondent wrote to Mr. Buckland, one of the directors of the company, to inquire how he might dispose of the shares, so as to get rid of his responsibility in respect thereof, to which Mr. Buckland replied, that by the terms of the deed of settlement a shareholder's responsibility would cease upon a registered transfer of shares; and that it was not necessary to offer the shares in the first instance to the company.

On the 3rd of March the respondent addressed a letter to the directors of the company as follows:—"When I had the pleasure of seeing you last week at Neath, I made you acquainted with the obligations I am under with my partner in the wine and spirit business, of not being engaged in partnership in any other concern. As you are aware of the circumstances which have led to my connexion with the Brewery, may I beg the favour of your assisting (under these circumstances) in relieving me from being a shareholder. I doubt not, in the present want of capital of the company, this request is not so convenient as it otherwise might be, and that therefore I must make a sacrifice; but having no choice in the matter, I leave myself in your hands, trusting you will do the best for me in your power, and as early as possible."

To this application the directors replied by a letter of the 5th of March, stating that they had every disposition to assist the respondent, but that they could not at

that time entrench upon the capital of the company, and suggested that the difficulty in respect of the stipulation of the respondent with his partner might be obviated by transferring the shares into the name of a friend.

On the 7th of March 1842 the respondent wrote to the directors as follows:—
 "I am favoured with yours of the 5th inst. I would prefer taking a debenture from you at 6*l.* per cent. for the seventy-two shares, rather than ask any friend to have them transferred into his name. I do not know the time you purpose to issue the debentures at, and will thank you to let me know. This mode would not interfere with the capital for some time, until you were in a condition when it would not incommode you." In April 1842 the directors of the company, on behalf of the proprietors, agreed to purchase from the respondent the seventy-two shares, at 20*l.* per share, provided he would advance, by way of loan to the company, 260*l.*, and would take the debentures of the company, payable three years after date, with interest thereon in the mean time for the loan and for the purchase-money of the shares, in all 1,700*l.*, which the respondent agreed to do; the purchase was completed on the 11th of April 1842, when the respondent advanced the sum of 260*l.*, and delivered up to the directors the certificates of the seventy-two shares, and received from the directors debentures, dated the 11th of April 1842, for the agreed amount, and which were duly signed by three of the directors; but no deed of transfer of the said shares was executed by the respondent or his wife, or either of them. A dividend on the said shares was declared in June 1842, of which the respondent and his wife received a proportionate part up to the 11th of April 1842, and never received any further dividend or benefit in respect of such shares. The interest which accrued due on the debentures was paid by the company, and at the end of three years the debentures were exchanged for the promissory notes of the company for the sum of 1,700*l.*, payable at six and twelve months, all of which sum, except 400*l.* which had been since paid off, still remained due, together with an arrear of interest

thereon. On the 27th of October 1843 the directors gave to Mr. White the following document:—

"Fo. 69,—William White of Bristol, gentleman.

"April 11th, 1842.

"Sold to the directors, on behalf of the proprietors, 72 shares—Nos. 31. to 60; 2,491—2; 3,540 to 3,559 and 3,490 to 3,509.

"W. H. Buckland,

"Joseph Rusher.

"We hereby certify that the above is a true extract from the share register books of the Vale of Neath and South Wales Brewery Company. Dated the 27th day of October 1843.

"W. H. Buckland }
 "Joseph Rusher } Directors.

"William Lowther, Secretary."

On the 23rd of February 1842, an extraordinary general meeting of the proprietors of the company was held, at which Mr. White attended and moved three resolutions relative to the conduct of the business of the company and the raising additional capital; but the respondent never signed or was required to sign the deed of settlement of the company or any deed of accession thereto.

The deed contained four clauses relating to the present question, which were as follows: 37—"It shall be lawful for the present or future proprietors, and all persons claiming under them or in their right, whether by marriage or as executors, legatees, guardians, committees, or assignees, upon bankruptcy, insolvency, or otherwise, to assign or transfer the respective shares of such proprietors respectively in the capital and property of the said company to any person or persons in severalty, but no assignment or transfer without the approbation of the directors, to be manifested as hereinafter mentioned, shall have any force either at law or equity."

Clause 38. "Husbands of female proprietors, executors, administrators, or legatees, may with the approbation of the directors to be manifested as hereinafter mentioned, but not otherwise, be admitted and become proprietors of the company in respect of the shares which belonged to or

were claimed by them as such; but husbands, executors, administrators, or legatees who do not apply for or obtain the approbation of the directors to be admitted proprietors, and also all guardians, committees, or assignees upon bankruptcy, insolvency, or otherwise, shall within six calendar months after becoming entitled to the shares belonging or claimed by them respectively in such characters, sell and dispose of the same; and on refusal or neglect so to do, shall forfeit the said shares for the benefit of the other proprietors of the company. Every purchaser or transferee of a share or shares, and every husband, administrator, or legatee who shall have obtained the approbation of the directors to be admitted a proprietor in respect of the share or shares belonging to or claimed by him or her as such, shall, unless already a proprietor of the company in respect of some other share or shares, execute this indenture or some deed of accession thereto, binding himself or herself to conform to, observe and abide by all stipulations, regulations and provisions, for the time being affecting or intending to affect the proprietors of shares in the capital and property of the company; and no purchaser, transferee, husband, executor, administrator, or legatee unless already a proprietor shall become a proprietor before being approved of by the directors as fit to become a proprietor, or before executing this indenture or some deed of accession thereto, be entitled in any manner or respect whatever to any of the rights, privileges or benefits of a proprietor of the company, save and except to a proportionate part of the income or proceeds of the capital and property of the said company upon the next yearly or other division thereof."

41. "Upon all transfers of shares to purchasers and others approved of by the directors, and in all cases of husbands, executors, administrators, or legatees, applying to become proprietors of shares belonging to or claimed by them in those characters, and being approved of by the directors, such alterations shall be made in the share register book and also in the copies by way of certificate of former entries therein, respecting the same shares, as the circumstances may require; and the approbation of the directors, in all the above cases, to

be valid, shall be manifested by entries or memorandums to that effect in the share register book, under the signature of two of the directors for the time being, and by like memorandums so signed or indorsed upon the copies or certificates of the former entries respecting the shares in question in the share register book; or, instead of such last-named memorandums by such copies or certificates being delivered to the parties entitled thereto of the new or altered entries respecting the same shares in the share register book."

42. "In case any husband of a female proprietor, or any executor, administrator, or legatee, who shall not obtain the approbation of the directors to be admitted a proprietor of the company, or in case any guardian, committee, or assignee, upon bankruptcy or insolvency, shall not be able, within six calendar months from the time of his marriage, or of his becoming executor, administrator, legatee, guardian, committee, or assignee, to sell or dispose of the share or shares belonging to or claimed by him in such character or right as aforesaid to some other person or persons to be approved of by the directors as proper to become the proprietor or proprietors thereof, it shall be lawful for the directors in all such cases, and they are hereby required, on the application of the person holding, or entitled to, or claiming such share or shares as aforesaid, to purchase the same from him or her at the current or market price thereof, or for such other price as the directors shall think fair or reasonable; and the share or shares so purchased shall, under the order of the directors, be transferred to one of the trustees for the time being, in trust for and for the benefit of himself and the other proprietors of the company."

Mr. Russell and Mr. T. H. Terrell, in support of the motion.—The purchase of the shares by the directors was irregular and a breach of trust, and is therefore void—*In re Vale of Neath Brewery Company—Morgan's case* (1). The power to purchase, under the 42nd clause of the deed, did not come into operation until the six months

(1) 1 Hall & Twells, 320; s. c. 1 Mac. & Gor. 225; 1 De Gex & Sm. 750; 18 Law J. Rep. (N.S.) Chanc. 265.

had expired, and the obligation of purchasing only arises after the directors have rejected the person entitled or his nominee as a shareholder. The shares, moreover, were never transferred into the names of the trustees in pursuance of the clause; and the respondent is liable in his own right, as having attended the meeting of the 23rd of February 1842 and exercised the rights and privileges of a proprietor.

Mr. Bacon and *Mr. Toller*, for the respondent, were not called upon.

The LORD CHANCELLOR.—It appears to me, taking these two clauses together, the 38th being necessary to be thoroughly understood in order to understand the 42nd, that the Vice Chancellor has come to a right conclusion. By mixing up matters that are in no way connected together a great deal of confusion in the language of the deed has been created; but confining it to that which is the subject of the present question, it is perfectly clear; the fact being that the husband of a female proprietor of shares, not having applied to be admitted, not having obtained the approbation of the directors, and not having sold, enters into an agreement within six months, in April 1842, by which, under the authority of the company, he, by a note or memorandum, sold to the directors, on behalf of the proprietors, seventy-two shares—then it enumerates them. There is a contract for sale and an actual transfer, a contract for a sale, or a memorandum of sale, by the proprietor to the company; and the only objection here stated to that is this, that it was done before the expiration of six months. Now, nothing can be plainer, I think, than the purport of these two sections; but what is mainly to be looked to is the provision of the 38th section, for that describes what it is that the husband of a female proprietor is to do. The husband of a female proprietor may, with the approbation of the directors, to be manifested as after mentioned, but not otherwise, be admitted and become a proprietor of the company in respect of the shares which belonged to or were claimed by him as such. But husbands who do not apply for or obtain the approbation of the directors to be admitted proprietors, shall, within six calendar months after

becoming entitled to the shares, sell their shares, and on refusal or neglect so to do, shall forfeit the said shares for the benefit of the other proprietors of the company. I adhere to the construction I put on the word "forfeit" in the first instance. My observation was, that it would be an absurdity to suppose that the company, after the expiration of six months, would pay for that which they had the means of obtaining without payment. Whether the word was "forfeit" or "merge" was, for that purpose, identically the same. Therefore, giving the word "forfeit" the meaning which the learned counsel wishes to give it, the objection is fully answered. That is the provision of the 38th section, but still there was one matter to be provided for. There are two modes prescribed by which the husband of a female proprietor is to get rid of the shares or to deal with the shares: he is either to be admitted as a proprietor in right of the shares to which he became entitled in right of his wife, or he is to have six months to sell them. The company will not permit that sort of interest to remain outstanding after the expiration of six months; therefore it gives him six months, after which the shares are to be forfeited. Then the 42nd section says, "In case any husband of any female proprietor shall not obtain the approbation of the directors to be admitted a proprietor of the company, or shall not be able within six calendar months from the time of his marriage to sell, then it shall be lawful for the directors in all such cases, and they are hereby required on the application of the person holding or entitled to or claiming such share or shares as aforesaid, to purchase the same" according to the mode prescribed. Nothing is more obvious than that this cannot be necessary to be postponed until after the expiration of six months. I do not say the directors, if so minded, are precluded from entering into it after the expiration of six months, but it cannot be contended that that is not to be a matter of negotiation and purchase within a period of six months; on the contrary, the intention must be that the party not having made up his mind to be a proprietor himself, or to sell his shares, but preferring to deal with the company, they should, as

between themselves, have recourse to that last scheme of getting rid of the shares which belonged to the wife. There is no obligation on the party to comply, there is nothing compulsory, there is liberty reserved to him of vesting in himself the beneficial interest in the shares belonging to the wife, which he may do by either of the two modes prescribed. If he does not by either of those two modes, there is the third. The third has arisen, and the directors have purchased. How it can be contended that the case of *Morgan* has any reference to the present I cannot understand. The case of *Morgan* proceeded on the misapplication of trust funds. There was a certain mode prescribed to the company by the deed under which they were to administer the trust funds. In a certain event they had a power of buying shares, and that power not having arisen, they could not justify what they had done under that provision. Then, if they did not buy, and buy under that provision, they had other duties to perform, and other modes of application were prescribed. I was of opinion, the event not having arisen, and the deed not authorizing them to purchase, that they were misapplying the trust funds in purchasing shares of other proprietors. Therefore, I thought, on that ground, that what was attempted could not be justified. I justify and confirm this transaction because it is, in my opinion, precisely within the terms of the deed. The great difference between that case and the present is this, that there I objected to it because it was not authorized by the terms of the deed; and I confirm this because I conceive that it is within the terms of the deed. It appears to me, therefore, that the Vice Chancellor has come to a perfectly right conclusion; and this application must be dismissed, with costs.

L.C. { *In re* THE VALE OF NEATH AND
March 8. { SOUTH WALES BREWERY COM-
 PANY, *ex parte* WALTERS.

Company — Winding-up Act — Contributory — Informal Transfer.

Shares in a joint-stock company were transferred into the name of W. in the share

ledger of the company, and were accepted and paid for by him, and he received dividends thereupon; but no formal transfer was made to him in the mode prescribed by the deed of settlement:—Held, that W. was a shareholder as between himself and the other shareholders of the company.

The Master had excluded the name of Mr. Walters from the list of contributories. The official manager moved, before Knight Bruce, V.C., that the name of Mr. Walters might be restored to the list as a contributory in respect of fifty shares of 20*l.* each. The facts of the case were these:—In 1840 Mr. Buckland, who was the managing director of the company, applied to Mr. Walters to become a shareholder in and a director of the company. Mr. Buckland was at that time indebted to Mr. Walters in the sum of 1,500*l.*, and Mr. Walters agreed to become such director, and to take fifty shares of 20*l.* each, to qualify him for such directorship, upon the understanding that Mr. Buckland would repay him 1,000*l.*, part of the 1,500*l.*, in order to enable him to take up the fifty shares. Mr. Walters' name as a director was then inserted in the advertisements of the company. On the 23rd of January 1841 Mr. Buckland wrote to Mr. Walters as follows:—"I have placed fifty brewery shares in your name as a qualification for directorship." The shares, however, were not transferred until the 1st of February 1841, when the accountant of the company, by Buckland's direction, transferred to the account of Mr. Walters in the share ledger of the company fifty shares. These shares were previously standing in the same ledger to the account of the directors, being part of the shares of the company which had never been issued. The accountant, at the same time, credited Mr. Walters with 1,000*l.* in payment of the shares, and debited Mr. Buckland with the like amount on a loan account.

On the 26th of March 1841 Mr. Walters wrote to Mr. Buckland as follows:—"When I agreed to take shares in the brewery to qualify me for the direction, it was my full intention to pay promptly for the fifty shares, and afterwards, as my monies came in, to take fifty more; and as I have not kept up my first intention,

I feel bound to tell you the reason." The letter then stated certain disappointments in the receipt of monies as the reason.

On the 3rd of May 1841 Mr. Walters wrote to Mr. Buckland as follows:—"Not having received dividend warrants, I concluded that no shares had been transferred to me; because, if they had, I ought to have received the dividend warrants, and have paid interest until the money was paid for the shares. However my object in mentioning this is, an impression that I have strongly on my mind, that if the shares are not transferred into my name they had better not be, as I think that I can be of more service to you in not being a shareholder than in being one. It strikes me that our company [the respondent being a partner in a banking company] will decidedly object to discount for your company when they know that I am an interested party," &c. "I know that I am pledged by promise and agreement, but let me press this upon you, and weigh it well."

On the 4th of May 1841 Mr. Buckland wrote to Mr. Walters a letter in which, after giving reasons for not immediately forwarding the dividend warrants, he proceeded, "I cannot give up the pleasure as well as the advantage of your co-operation as a shareholder and director in our company. Indeed, we merely waited the formality of your being nominated and elected at the general meeting of our company on the 12th."

On the 12th Mr. Walters was elected a director.

On the 26th of May 1841 Mr. Walters wrote to Mr. Buckland as follows:—"As I understand the matter of the shares, it is as follows: they stood in my name in January, and as they were not paid for, I am indebted to you or to the firm (as the case may be) interest from that time to the time of payment," &c. "On the other hand, I am entitled to the dividend lately declared."

On the 26th of May Mr. Walters's original fifty shares were exchanged for fifty 8*l.* per cent. new shares, which were thereupon transferred from Mr. Buckland's account to the account of Mr. Walters in the books of the company.

On the 16th of June 1841 the certificates of the fifty new 8*l.* per cent. shares were

forwarded to Mr. Walters, with an account stated between him and the company, on which credit was given to him for interest at 8*l.* per cent. upon the purchase-money of the fifty new shares from the 1st of February, and in which he was debited with interest on the 1,000*l.* for the same period; and a cheque was inclosed for 11*l.* 13*s.* 4*d.*, the balance appearing due to Mr. Walters on the account so stated; the receipt of which Mr. Walters acknowledged by letter.

On the 6th of October 1841, Mr. Walters having heard that a bill of the company had been dishonoured, wrote to Mr. Buckland as follows:—"How greatly I wish that you had candidly told me of your engagements to the North Wilts Bank before I had joined you, as I think you ought to have done, for although it would have prevented my becoming a partner, yet I could have materially assisted you."

On the 11th of October Mr. Walters formally retired from the directorship, assigning as a reason, the incompatibility of that office with his duties as member of a banking company; and thereupon the fifty new shares were re-transferred to the company, and on the 27th of October 1841 Mr. Buckland remitted to Mr. Walters a cheque for 113*l.* 11*s.*, being the amount of an account made up of several items, one of which was "half-year's directorship, 37*l.* 10*s.*" To this item Mr. Walters made no objection. It did not appear that Mr. Walters ever interfered in the business of the company or attended any meeting of the directors.

Upon the original hearing of the motion, the Vice Chancellor was of opinion that the evidence went to shew that the fifty original shares belonged to the company, and were transferred into Mr. Walters's name in the share ledger with his consent, and that he accepted the same, and agreed to pay for them, and did pay for them; and that Mr. Walters thereby became effectually a shareholder as between the shareholders themselves, notwithstanding the formalities of the deed were not complied with; and as the Master's decision proceeded upon the ground that he, Mr. Walters, never in fact became a shareholder, his Honour referred it back to the Master to review his report in that respect, without expressing any opinion upon the point whether Mr. Walters,

having been once liable, had been discharged from that liability by what took place subsequently. The respondent appealed from that decision to the Lord Chancellor.

Mr. Bacon and Mr. Southgate, for the appellant, *Mr. Walters*.—The formalities of the deed were not complied with in the first transaction, and, therefore, *Walters* never was a shareholder liable to losses, however much he may be liable to creditors of the concern, by holding himself out as a director. The circumstances relied upon as making him liable are the receiving the salary of a director and dividends upon the shares; but the salary was a gratuitous payment on the part of *Buckland*, being not warranted by the deed; and the payment of the dividends was made by the company to *Buckland*, and not to *Walters*. *Walters* could acquire no legal right to profits by these transactions—*Chartres' case* (1).

Mr. J. Russell and Mr. T. H. Terrell, for the official manager.—The original fifty shares were allotted to *Walters* by *Buckland*, as the agent of the company, and were accepted and paid for by *Walters*, whose name was thereupon entered in the company's books as proprietor. These shares could not, according to the deed of settlement, have been re-transferred to the company, without the assent of every shareholder—*Morgan's case* (2); and such acquiescence is not alleged. *Mr. Walters*, therefore, must still be held a contributory in respect of these fifty shares.

Mr. Bacon replied.

THE LORD CHANCELLOR.—*Mr. Walters's* name appears in the company's books as a shareholder; he is therein also credited with certain sums for dividends and salary, and he allows his name to go forth to the world as a director of the company. I am of opinion that the judgment of the Vice Chancellor was correct, and the appeal must be dismissed, with costs.

L.C.
Feb. 6, 11, 12. } SANDERSON v. THE COCK-
ERMOUTH AND WORKING-
TON RAILWAY COMPANY.

Specific Performance—Railway Company—Purchase of Lands by Agreement—Easements.

A, the owner of lands in the line of a railway, agreed in writing to sell a portion of such lands to the company, subject to the company making such roads, &c. as might be necessary to connect the portions of *A's* lands which would be severed by the line. *A* conveyed the land comprised in the agreement to the company, who entered and made their line. Disputes afterwards arose as to the sufficiency of the communications made by the company. On bill by *A* against the company for specific performance,—Held, that the contract was one which would be enforced in equity, and that the jurisdiction of the Court was not ousted by the Lands Clauses Consolidation Act, none of the provisions of which respecting the mode of ascertaining compensation were applicable to the case of a purchase by agreement, but only to a compulsory taking of lands by the company; and the Court referred it to the Master to inquire and state what roads were necessary and proper.

An act was passed in the 8 & 9 Vict. c. cxx. for making a railway from the market town of Cockermouth to the port of Workington, in the county of Cumberland, entitled "The Cockermouth and Workington Railway Act, 1845." The plaintiff, *J. Sanderson*, was the owner of certain lands which the defendants, the company, were authorized by their act to purchase and take for the purposes of the railway.

By an agreement in writing, dated the 2nd of March 1846, and made between the plaintiff of the one part, and *W. Dickinson*, on behalf of the defendants, the Cockermouth and Workington Railway Company, of the other part, the plaintiff agreed with *W. Dickinson* to sell to the company so much and such parts of the lands situate in the townships of Little and Great Clifton, in the county of Cumberland as he, the said *J. Sanderson*, could, by virtue of the said act or otherwise, lawfully agree to sell and as should be required by the said company, consisting of

(1) 1 De Gex & Sm. 581.

(2) 1 Hall & Twells, 320; s.c. 1 Mac. & Gor. 225; 1 De Gex & Sm. 750; 18 Law J. Rep. (N.S.) Chanc. 265.

two parcels of land, containing respectively 1 a. 0 r. 23 p. and 1 a. 2 r. 5 p., part of certain closes called respectively Codfit and Botland, and numbered on the railway plan respectively No. 15 and No. 20, with the appurtenances, subject to the making such roads, ways, and slips for cattle as might be necessary, for the sum of 352*l.*; and that the plaintiff, with all other necessary parties, should, on the consideration money for the said premises being duly paid by the company, convey to the company all the estate, right, title, interest, claim and demand whatsoever, of, in and to the said lands which he, the plaintiff, or his heirs, could or might, by virtue of the said act or otherwise, lawfully grant, release or convey; and W. Dickinson thereby agreed with the plaintiff that the said company should, on the execution of such conveyance, pay the price agreed upon, with interest, &c.; and it was further agreed that the company should not be liable to make or pay any further sum or compensation to the plaintiff for any damage done to any other lands and grounds of the plaintiff than the sum of 352*l.*, unless notice should be given by the plaintiff to the company within two months next after any such damage or injury should have been done; and if the company, in using the lands thereby contracted to be purchased, or otherwise in carrying into effect the purposes of the said act, should injure or damage any other lands of the plaintiff, and having received such notice as aforesaid, then if he and the said company should not agree as to the amount of compensation to be given for such injury or damage, the matter should be referred to arbitration.

The closes called Codfit and Botland were part of a considerable estate, of which J. Sanderson was the owner in fee simple, subject to a mortgage.

The close called Botland was bounded on the north side by the river Derwent, and the line of the railway through the said close entirely severed the residue of the said close, which bordered on the Derwent, from the plaintiff's homestead and lands on the opposite side of the railway line, and which homestead and lands were altogether dependent for the necessary supply of water on the communica-

tion with the river Derwent, through the close called Botland. On the 29th of March 1846, J. Sanderson and his mortgagee conveyed to the company the parcels of land comprised in the agreement, and the company entered thereupon and made their railway across and through the same. The line of the railway passing through the property of the plaintiff was formed principally by means of a deep cutting extending nearly the whole length of the land so taken, and as to the remainder, by works on a level with the adjoining land; that part of the line which was on a level being at the west end of the land taken by the company; so that the previously existing communications between the plaintiff's lands on each side of the line were cut off. The company proposed to give the plaintiff a communication between his homestead and the remainder of the close called Botland, by means of a level crossing at the west end for loaded carriages, and by a covered driftway or creep underneath the line for his cattle. The plaintiff insisted that the company were bound to give him a communication by making a bridge across the cutting, either at or near the south-eastern extremity, or the middle of the close called Botland, where the communications previously existed; and that he was not bound to accept a communication less convenient than that which he enjoyed previously, and which was 220 yards distant; and he objected that the level crossing would be dangerous and that the underground driftway would be liable to be flooded.

Various interviews and communications took place between the plaintiff and the officers of the company; the company making proposals to submit the matter to arbitration, to which the plaintiff declined to accede; and on the 18th of January 1847, the plaintiff served the company with a written notice that he required them to make a bridge at either of the old points of access, and that in default of their compliance with such notice, he should take proceedings to enforce his rights in equity. The company having refused to comply with this demand, the plaintiff filed his bill, praying that the agreement of the 2nd of March 1846, so far as the same remained to be executed,

might be specifically performed under the direction of the Court, and that the defendants, the company, might be directed to make all such ways, roads and slips for cattle as were necessary and proper for and with regard to the convenient and advantageous occupation of the plaintiff's said lands; and that the company might be restrained by injunction from in any manner using the land taken and purchased from the plaintiff, so as to prevent or in any manner obstruct the free passage and communication by the plaintiff and his tenants or their servants, workmen and cattle, to, from and with the said close called Botland from the plaintiff's said homestead on the opposite side of the said railway, until the company should have made such proper and necessary ways, roads, and creeps for cattle as aforesaid; and in particular from using or running, until such acts as aforesaid should have been done, any steam carriage over or upon the line of railway made upon the land so taken and purchased from the plaintiff.

The defendants, the company, by their answer, alleged that they had always been ready and willing, and now were ready and willing, to abide by and perform, and that they had, in fact, performed the stipulations contained in the said agreement. They admitted the existence of the two previous entrances into the said close called Botland from the plaintiff's homestead, and they insisted that the new communications made by them were equally convenient.

There was a great mass of conflicting evidence on both sides as to the sufficiency of the accommodation works.

On a motion for an injunction in the terms of the prayer, the Court made the following order:—The defendants, the company, by their counsel, submitting to perform the agreement under the direction of the Court, the Court doth not think fit to make any further order.

On the 4th of April 1849, the cause came on for hearing before the Master of the Rolls, and the decree declared that the plaintiff was entitled to a specific performance of the agreement of the 2nd of March 1846, and the same was decreed accordingly; and it was ordered that it should be referred to the Master to inquire and state

what roads, ways, and slips for cattle were necessary and proper or required for the purpose of obtaining and preserving convenient communications between the portions of the plaintiff's land which were severed by the defendants' railway (1). The defendants appealed from this decree.

Mr. Rowpell and *Mr. Renshaw*, for the plaintiff, in support of the order below.—There is no objection to a bill for specific performance from the nature of the act here required to be done—*Pembroke v. Thorpe* (2), *Price v. the Corporation of Penzance* (3), and *Storer v. the Great Western Railway Company* (4). The equitable jurisdiction is not ousted by the statutory remedy, even if the case were within the 8 Vict. c. 18.

Sheriff v. Coates, 1 Russ. & M. 159.

Coats v. the Clarence Railway Company, 1 Russ. & M. 181; s. c. 8 Law J. Rep. Chanc. 72.

Kemp v. the Brighton Railway Company, 1 Rail. Cas. 495.

Mr. Malins and *Mr. Borton*, for the defendants, the appellants.—This was a purchase under the Railway Acts, and the plaintiff was bound to take the course prescribed by the 68th section of the Lands Clauses Consolidation Act. That act is referred to in the agreement; and therefore the words of the 68th section are as much part of the contract as if the section was inserted *in totidem verbis*, and where parties have introduced into a written contract that which the law implies, this makes no difference. But the act does not throw any obligation upon the company to make roads equally convenient to the proprietor as the old roads, but in case of inconvenience gives to the proprietor compensation; and if the words of the contract go beyond the act, this is not that kind of case which will entitle the plaintiff to the extraordinary remedies by way of specific performance; but the party will be left to his remedies at law.

(1) 11 Beav. 497.

(2) 3 Swanst. 437, n.

(3) 4 Hare, 506.

(4) 2 You. & C. C.C. 48; s. c. 12 Law J. Rep. (N.S.) Chanc. 65.

The LORD CHANCELLOR.—This is an agreement, by a railway company, to purchase certain lands. The agreement takes notice of the act, but only for the purpose of shewing the authority of the parties purchasing to deal with the subject-matter of the contract. It is, in fact, a private contract; and the only difference between this and other contracts is, that the parties purchasing are authorized to contract by an act of parliament. The contract provides, that the purchase shall be made, subject to the making such roads, &c. as may be necessary. The company, by virtue of the contract, get possession of the vendor's land. Then comes the dispute as to the communications. Whether that dispute is well founded or not, the Court will best be able to judge by means of the Master's report. The plaintiff has a right to have the jurisdiction of the Court exercised upon this contract as to whether what has been tendered to him by the company was such a communication as he was justified in expecting. The property has been taken by the company, and the plaintiff now asks that the contract may be performed on the part of the company. The order made upon the motion for an injunction left it open for the defendants to contest the question of jurisdiction. But, independently of the submission of the parties to perform the contract, I think the Court had jurisdiction to decree specific performance in this case. No doubt the acts of parliament did not intend to interfere with private contracts. The company, having a capacity to purchase by virtue of their act, may deal with parties within the limits of the act by such contracts as they may think proper. They have a right to obtain the land they require by private contract; but if they cannot make a private contract, then the act gives them the means of compelling proprietors to part with their land. But the provisions of the act apply only to cases in which there is a compulsory taking by the company, and do not interfere at all with private contracts. Here the parties have not been acting at all under the act, except so far as the individuals agreeing to purchase derive their capacity to purchase under the act. Beyond that, it is a mere private contract for sale to the company. What is the con-

tract? It is a contract for the purchase of lands, subject to the duty of making communications between the lands severed by the railway. The defendants having got from the plaintiff a performance of his part of the contract, must not the Court interfere for the purpose of securing to the plaintiff that advantage which he has contracted for? The Railway Acts regulate the method of compulsory purchases, but there are no such distinct provisions in the acts for regulating the mode in which private contracts entered into by a company shall be carried out. There is no doubt that this Court has jurisdiction in such last-mentioned contracts, for there is nothing to take away the Court's original jurisdiction to see that the enjoyment of the easements contracted for is secured to the vendor. None of the cases referred to apply to the case of a private contract, which this is. The Court, then, has adopted the right course in decreeing specific performance, and the right means of carrying that decree into effect. The Court does not enter into the details of whether such and such a transit be sufficient or not; all that is for the Master to consider.

Appeal dismissed, with costs.

K. BRUCE, V.C. } THOMAS v. ROBERTS.
May 7, 8, 22. }

Parent and Child—Custody of Infant.

Mr. T. married Miss N. in July 1845, and deserted her in February 1846. In June 1846, a child of the marriage was born. After the separation, Mrs. T. went to the house of her mother, and there she and her child were maintained. Mr. T. after the separation resided at an establishment called "The Agapemone," in which a number of persons forming a kind of sect lived. It was avowed by Mr. T. that he, in common with the other members of the establishment, considered prayer to God as unnecessary and superfluous; and that they did not in any manner observe Sunday or acknowledge a Sabbath. Between the separation and 1850, Mr. T. had not taken the slightest notice of his wife or child; but in the spring of that year he made an attempt to possess himself

of the child by force. The Court ordered that, under these circumstances, Mr. T. should be restrained from removing, or obtaining possession of, his child.

On the 9th of July 1845, the Rev. Mr. Thomas married Miss Agnes Nottidge. On the 2nd of February 1846, he deserted her, and in the month of June 1846 Mrs. Thomas gave birth to a child, who was named George Nottidge Thomas.

Previously to the marriage, Mr. Thomas attached himself to a Mr. Prince, who had laid claim to spiritual privileges, and founded a sect; and shortly after the marriage, Mr. Thomas joined an establishment called "The Agapemone," of which Prince was the head, where he had ever since lived.

Shortly after the birth of her child Mrs. Thomas went to the house of her mother, Mrs. Nottidge, where she and the child had ever since lived.

In the spring of 1850, Mr. Thomas, who had never previously in any way noticed his child, appeared at Mrs. Nottidge's residence, and attempted forcibly to take away the child.

The bill in this suit was filed merely for the purpose of formally bringing the child within the protection of the Court; and a petition was now presented in the name of the child for the purpose of protecting him from his father. This petition now came on to be heard.

Very voluminous affidavits were filed in support of the petition, in which the previous life of Mr. Thomas, the history of his courtship, the circumstances attending the separation, and several of his letters, were set out. The affidavits also contained a statement of the doctrines of Mr. Prince and several of his letters, manifestoes and all that was known or could be ascertained of the proceedings and manner of life of the inmates of the Agapemone.

Three of Mrs. Thomas's sisters lived in the Agapemone, one of whom was married to a Mr. Cobbe, another to a Mr. Price, the other, Louisa, being single. Some affidavits were filed in reply by Mrs. Cobbe, Mrs. Price, and Miss Louisa Nottidge and others. All the material parts of both sets of affidavits are fully set out in the judgment.

Mr. Wigram and Mr. Goldsmid, for the petition, contended that, under all the circumstances of the case, the desertion by Mr. Thomas of his wife and child, the blasphemous doctrines that he held or sanctioned, and his residence in such a place as the Agapemone, he was not entitled to the custody of his child.

[In the course of the argument His Honour asked if there was any charge of unchastity against the inmates of the Agapemone.

Mr. Wigram said that it was considered that he had quite enough to go upon without introducing that subject, which obviously nothing but necessity would induce him to have recourse to.]

Mr. Thomas in person opposed the petition.—He denied that there was any ground whatever for the charge of unchastity, and complained of the manner in which the question put by the Court had been answered by the counsel for the petition. He said that many of the members of the Agapemone had been distinguished for prayer, and had been the most prayerful of men; but that prayer had been discontinued for this reason, that they had obtained and were in the complete fruition and enjoyment of all that prayer could obtain, and that prayer was therefore unnecessary and superfluous. They abounded however in praise and thanksgiving, and he repeated some verses which the members were in the habit of repeating or singing, as evidence of their religious feeling. He admitted that they did not observe Sunday, and did not give any one day in the week preference, in the way of religious observance, over the others, and mentioned as a reason that they considered every day as given to the Lord. He said that they considered that they had a right to enjoy to the fullest extent innocent pleasures, and enlarged on the beauty of the horses kept at the Agapemone. He also complained of the conduct of his wife. He had not deceived her; she knew perfectly well before the marriage his connexion with Mr. Prince, and the religious views that he held. It was with the full knowledge, and apparently with the fullest agreement with these views that she had become his wife. If, after her marriage, she had changed her opinions and had

openly and honestly told him of the change, something might have been done short of their separation. But she had not so acted. He considered himself deceived and ill-used by her, and justified in the course which he had taken. He denied that he considered Mr. Prince as having any supernatural powers.

Mr. Wigram replied.

KNIGHT BRUCE, V.C.—This case was before the Court upon a petition presented in the name of George Nottidge Thomas, an infant, by his uncle-in-law F. P. Ripley as his next friend. It prays that some proper person or persons may be appointed the guardian or guardians, or to have the care of the infant during his minority, and that proper directions may be given for his maintenance and education; and that George Robinson Thomas and his agents may be restrained by the order of the Court from applying for any writ of *habeas corpus* for the purpose of obtaining the possession or the custody of the infant, and also from taking forcible means, or otherwise taking possession of him, or in any manner interfering with him.

The petitioner is at present in the fourth year of his age, and is the only child of the marriage. His parents are both living, one of them being Mr. George Robinson Thomas, mentioned in the prayer and in many parts of the petition, a native, as I collect, of Wales, who seems to have been educated at Lampeter, with a view to become, as in fact he did become, a minister of the Church of England. I do not, however, collect that he proceeded beyond Deacon's orders, or that he now considers himself to be a member of that Church. I understand him to dissent, and to have seceded from it. Nor does it appear, from the observations which he addressed in person to the Court, that he has any present or prospective preferment, office, employment, business, fortune, means, or source of income whatsoever. His wife, the petitioner's mother, is one of the daughters of a gentleman of good fortune, who resided in Suffolk, but who died before her marriage, leaving a widow, still living, the grandmother of the infant, under whose protection and in whose house the child now is. This lady I collect to be in

good circumstances, and to be a person of respectability. The daughters' portions seem to have been at least as much as, in the situation in society to which they belonged, is usual. That of Miss Agnes Nottidge, the petitioner's mother, was, as I collect, between 5,000*l.* and 6,000*l.* Her marriage, whether equal or unequal otherwise, seems, in that respect at least, to have been unequal, for Mr. Thomas had not, I believe, any property. It took place without the consent and against the wish of Mrs. Nottidge, and it seems in a considerable degree ascribable, so far at least as Miss Agnes Nottidge is concerned, to the influence and ascendancy over her mind which must, I fear, be said, unhappily for her, to have been acquired and exercised by a fanatic or a pseudo-fanatic preacher, who styled himself "the servant of the Lord," who seems to have acted less as a "go-between" than as a spiritual director in forming this and other matches between endowed ladies and such of his followers or associates of the other sex as were judged fit for the purpose. One of these was Mr. Thomas, whom Miss Agnes Nottidge seems to have been led to believe it was the "will of God to reveal, through the servant of the Lord," that she should marry, and she did so very much on that ground. Thus, at least, the evidence strikes me.

Here I shall qualify a statement that I have made as to her husband's means, for she married without a settlement; her fortune consequently came into his power, as, if it remains, it still seems to be. The want of a settlement was, however, not through oversight; she mentioned the subject to him, it appears; at the same time she seems to have mentioned a promise connected probably with it, which she had made to one or both of her parents. I say this, because it appears that not quite three weeks before the marriage Mr. Thomas was able and permitted himself to write to her this all but impossible letter:—

"2, Windsor Terrace, Brighton, June 21, 1845.

"My very dear Agnes,—It gave me pleasure, by a letter from dear brother Cobbe, to learn that he had seen you off safely by mail on Thursday morning; by this time you are either with beloved

brother Williams, or else with the dear Mrs. Maber. I know their love in Jesus, and that they will do everything to render your sojourn in Swansea good for you. But I know something more; I know the boundless love of Jesus; He will be with you, for His eye is on you, and whatsoever is good, that will He bestow, whether it be joy or sorrow, ease or trial, comfort or difficulty; all things are yours, for you are Christ's, and Christ is God's. Let not your heart be troubled under your present circumstances, neither let it be afraid at what friends or foes may suggest. Abide in the Spirit and will of God, then will your peace be like a river, wide and overflowing, and your soul will be borne sweetly along the stream of time, until it reach the ocean of eternal love and rest. What I say unto you, I say also unto Harriet and Clara. Assure them of my love, and let them trust themselves to be carried by faith in the arms of Jesus whithersoever He will, not whithersoever they will, and they and you will find that he will do you good at your latter end. My beloved Agnes, I must write to you just what the Spirit leads me to do. This I do with the more confidence, because I believe you have an ear to what the Lord may say unto you through him that loveth you. You mentioned your desire to have a settlement of your property upon yourself; this I assure you would be very agreeable to my own feelings, and is so still; but last evening, waiting on God, this matter quite unexpectedly was brought before me. I had entirely put it away from my thoughts, leaving it to take its course as you might be led to act; but God will not have it so; He shews me that the principle is entirely contrary to God's word, and altogether at variance with that confidence which is to exist between us, 'who are 'one spirit.' This desire on your part must be abandoned; give it up to God, and shew that you can trust His faithfulness, and I can assure you the confidence you repose in Him will not be disappointed. I know God, and I know that none who trust in Him shall ever be confounded. 'He that hath an ear to hear, let him hear.' As regards the promise you made your parents, I would merely say, that any promise made when you were unconverted, and

which was not in accordance with the word of God, you are not bound, neither would it be right in you, to adhere to. I must bid you farewell, and believe me to abide, in much love, yours affectionately, in the everlasting covenant, Brother Thomas. The testimony of Jesus will be proclaimed in 'Adullam' on Sunday. Louisa and Cornelia are in a much more happy state; God is shewing His faithfulness to them."

Even this unparalleled performance failed to open the lady's eyes; and her marriage taking place on the 9th of July 1845, she so became annexed, and an addition, to the school or suite of the "servant of the Lord." The bride and bridegroom visited various places from the time of their marriage for more than half a year. During the latter part of that time they were at Weymouth, and lodged at a house where the "servant of the Lord" also was living; and here Mrs. Thomas appears to have received, I regret to say, from her husband, and not from him alone, treatment, on more than one occasion, of a coarse, harsh, and unmanly description, which was not, if it could have been, in any manner deserved. In January 1846, the "servant of the Lord" and some of his followers and associates went, I believe professionally, to Bridgwater, leaving Mr. and Mrs. Thomas and some others behind at Weymouth. Some of these, including Mr. Thomas, but not his wife, were soon, it seems, sent for. The summons, which professed, I believe, to be a call to attend a spiritual tea party at Bridgwater, was obeyed. On the 2nd of February 1846, Mr. Thomas departed from Weymouth, leaving his wife there, and promising or expecting to return in a few days. Mrs. Thomas was then, to his knowledge, in or near to the fifth month of her pregnancy with her first and only child, the infant now before the Court. Such being the state in which she was left, the "servant of the Lord" at Bridgwater seems to have remonstrated with Mr. Thomas, who instead of returning to Weymouth, sent there for his clothes, which his wife packed up and transmitted to Bridgwater accordingly. Having received them, he wrote on the 7th of the same February, and dispatched to her this indescribable communication:—

"Saturday Night, Bridgwater.

"My best beloved,—I herewith inclose you a small portion: eat, drink, yea, drink abundantly, and let your soul delight in fatness: let the will of God be your home and resting-place. Out of His will there can be no happiness, but in His will there is life, and joy, and peace. The 'servant of the Lord' told me that you would not be in your present state unless you had rebelled months ago; and thus you will suffer for it, in not being able to go about with me as you otherwise would; but when I see you I will tell you all about it; for the present abide quietly where you are, and go on as if I were with you. I have seen all the articles you sent in my portmanteau. I found much pleasure in looking at all the little things you had packed up. I do love you more than I can tell: we are parted outwardly, but we shall meet the closer as the consequence; we are separated now, but we are not severed; we see each other not, but we are one. For the present, farewell. Let Harriet and Clara have as much love from me as I can offer after that I give you.

"I abide, dearest, the same, your unchanging and affectionate

"Brother Thomas."

When it is known that the writer of this letter did not return to Weymouth, but that his departure from her on the 2nd of February was the commencement of a total separation, which has ever since continued—a separation equally wilful and causeless on his part—such a composition may seem to be in the last degree perplexing; but when it is said, "the servant of the Lord told me you would not be in this state unless you had rebelled," and the writer referring to the fact that his wife is the person addressed, to whom he had not been married more than seven months, and was then with child by him, one is driven with shame and confusion to hope, that there may not be a second human being capable of such extravagant indecency. On the 2nd of February 1846, this confiding and unoffending woman was, without the slightest justification, apology or excuse, deserted and abandoned—wilfully, completely, and finally deserted and abandoned—by her husband in the state which has

been mentioned. He has never since visited her or spoken to her, or, unless during his attempt, in the spring of the present year, to gain possession of the person of her child, or by admittance into her house, seen her. I say her house, because it sheltered her; it is, in fact, the house of Mrs. Nottidge, where Mrs. Thomas and her son for the last three years and more have found that protection and that home which the father of the child had refused to give it.

It must not, however, be inferred that Mr. Thomas left his wife and child to starve, or to be dependent on bounty merely, or parish relief. It is right to say, that he has from time to time transmitted, or permitted to be paid to her, the income, or part of the income, arising from the property which he had acquired in her right, by persuading her of the impiety of marriage settlements. The property of her own, or the entire income from it, supposing it had been received by her, was not an amount more than sufficient, if sufficient, for the proper maintenance of herself and child, both of whom have been (as to her, ever since the 2nd of February 1846, and as to the child, always) left by the husband without provision, except as I have stated, and wholly without protection, care, and help. I do not, I repeat, believe, that, so far as money is concerned, he had, or has, except from her property—that is, the property acquired from his marriage—the means of maintaining or contributing to the maintenance of either.

Though informed of the birth of his son immediately or within a proper time after the event, and asked, before the christening, what should be the name, he does not appear to have acknowledged the communication, or to have exhibited any feeling of interest concerning the child; or, indeed, until the attempt at carrying him away forcibly or clandestinely from his mother, in March in the present year, to have seen or wished to see him. Such a course of conduct seems inexplicable, except upon some supposition that I desire to think inadmissible, or the supposition that the influence and ascendancy of the person calling himself the "servant of the Lord" had been exerted, and prevailed over "Brother Thomas" as strongly as they had

at one time over his wife. I collect, that after the marriage she exhibited symptoms of insubordination, not towards her husband, but towards the "servant of the Lord;" attempted to shake her husband's allegiance towards him, and was found out, to which grievance was added, seemingly, this, that either a prophecy or a behest had been contravened by her being in the family way. However, upon these, or no more just grounds, the "servant of the Lord" took a dislike to Mrs. Thomas, after the marriage, and did mainly, if not solely, influence her husband's mind in his ill treatment, his unmanly treatment of her, and contributed to the separation, if it did not cause it. Nor ought it, probably, to be ascribed to Mr. Thomas's spontaneous feelings that he wrote to her that coarse and shameful letter, having, it seems probable, some reference to an action between Mr. Ripley and one of her sisters, a witness on this occasion for the respondent, which was dated the 2nd of November 1848, and was in these terms:—

"The Agapemone, November 2, 1848.

"Agnes,—Whilst I thought you followed your unhappy course quietly, I did not feel disposed to interfere with you; but since it has come to my knowledge that you have spoken wickedly of God's holy truth, and declared gross and scandalous lies of those I most honour, love, and esteem, I am resolved to adopt a different course towards you. How wretched is your condition; given up to your own wicked heart, you love and make a lie, and drink in as sweet food for your malice the vilest and most disgusting scandal. Shame on you; it is out of the abundance of your own carnal heart that your mouth speaketh. Oh, Agnes, what have you lost! However, I write merely to inform you of my determination concerning you. God is, I know Him, deep, pure, holy, gentle, love; I am His, and He is mine; you are mine, and I am resolved to use the authority God has given me to put a stop to your lying slanders, and for this purpose I can and will compel you to live where and how I please, and subject to my will and authority. Through God's pure love to me, and in me, I have hitherto yielded to you the greatest indulgence, and you have abused the liberty and indepen-

dence I trusted you with, as you have abused your other blessings. I have therefore felt the necessity of making you aware that I can and will direct your life; and this I will cause you to know by my actions, and not only by my words. Should you write again, or speak so, knowingly contrary to my wishes and to the truth, I will immediately remove your residence, and take the child under my own eye, and superintend the expenditure of the money for God's glory. I do not know that, under any circumstances, I shall look over your gross and selfish abuse of my forbearance towards you. Concerning the child, learn that I will do with it as God shall guide me—God, who is love, wholly undefiled love, but who could wither the pride and independence of your heart in one moment. As to my immediate conduct towards you personally, it will depend on yourself; for be sure I will do what I may deem good, after this warning, without giving you any further notice. Blest beyond conception by the knowledge of God, in His pure, holy and unchanging love and truth, I abide,

"Brother Thomas."

The power of the "servant of the Lord" over Mr. Thomas's mind seems to have continued, and to continue undiminished, although Mrs. Thomas appears to have been cured. It is in such a state of things that Mr. Thomas has, within the last three months, been endeavouring, and still avows an intention, to acquire the possession and custody of his son, which would of course involve the care and direction of his education.

Now, considering the boy's age, the respectability of the house that shelters him, and the care under which he is, I am not sure that, if there were nothing in the case but these and the other facts that I have mentioned, it would be proper to dismiss the petition, especially as it is probable that a sufficient provision will be made for the maintenance and education of the petitioner, independently of any assistance from his father. But there are other facts of importance, before proceeding to which I would ask specifically, how, if the father shall have the power and duties of guardianship, is he, from his income, to provide properly for the child's mainte-

nance and education ? This question, when the wife's unquestionable title to alimony and her husband's circumstances are remembered, must probably be of very difficult solution. Nor, indeed, perhaps, has he thought much, if at all, about the matter. To what abode is he to take the child ? To none suggested, except to the somewhat mysterious establishment so often mentioned during the argument and in the affidavits, of which it seems necessary to say a few words.

It appears that the "servant of the Lord" has founded or formed a cœnobitical establishment, which, though not on the Euripus, but on the Bristol Channel, he has denominated "Agapemone"—a name no doubt adopted in order to make the people of Somersetshire understand or guess its object, which however unluckily I fear few either there or elsewhere in any very clear manner do. The establishment scarcely seems to be a convent, either in connexion with the Greek church or otherwise. Its inmates, who are not a few, and are of each sex, can hardly be nuns and friars, for some, though not all, of them are married couples and the men and women are not separated. They, however, call themselves, and address each other as brothers and sisters, and there appears to be something of a religious kind, whether really as well as professedly or professedly alone, in the nature or design of the institution which, perhaps, might be described as a spiritual boarding-house, though to what kind of religion, if any, the inmates belong does not, I think, appear. I believe that they do not attend any place of worship in or out of the establishment. They sing hymns, I think, addressed to the Supreme Being ; but, as I collect, they do not in the sense of supplication or entreaty to God, pray at all. The Agapemonians appear to set a high value upon bodily exercises of a cheerful and amusing kind. Their stables, according to the description which Mr. Thomas gave me of them, must be unexceptionable. It does not appear that the Agapemonians hunt, but they seem distinguished both as cavaliers and charioteers. They play, moreover, frequently or occasionally at lively and energetic games, such as "hockey," ladies and all ; so that their

lives may be considered less as ascetic than frolicsome. The particulars, however, of the Agapemonians' esoteric existence, being not open to the general observation, are little, if at all, known beyond their own boundary ; but to works of usefulness or charity without, they are not, so far as I can collect, addicted. Now, this is the establishment in which Mr. Thomas has for a considerable time been and is one of the dwellers. He has, I apprehend, no other home, and thither accordingly I suppose that he would take his son. But God forbid that I should be accessory to condemning any child to such a state of probable debasement. As lief would I have on my conscience the responsibility of consigning this boy to a camp of gipsies.

It may be suggested, however, that Mr. Thomas, although he has not stated that he had any intention of leaving the "Agapemone," or of placing his son elsewhere, may be possibly able and willing to find some other abode for him ; and it seemed to me proper on that supposition or otherwise, to consider whether Mr. Thomas has or has not opinions upon important points such as to disqualify him in this country for the guardianship of an English child. In the first place, I think it right to say, that though I am satisfied with his denial of believing the "servant of the Lord" to be a deity, or not of the human nature, I doubt whether Mr. Thomas's mind is entirely free from participation in certain views concerning the "servant of the Lord," not very dissimilar to the opinions entertained concerning an eminent person of the seventh century, by those who consider that personage a prophet ; and I doubt, moreover, whether a man, who, having been ordained a minister of religion, as a Christian in a Christian community, has designedly and systematically avoided attending, and does designedly and systematically avoid attending any place of worship, whatever his private feelings may be and whatever hymns he may sing, ought, in any condition of circumstances, to be permitted in this country to have the guardianship or care of an English child, for whose maintenance and education there exist any other means of providing, although the child be his own. But that particular question I think it not

necessary in the present instance to decide, and I wish to be understood as giving no opinion upon it. However this may be, I apprehend that in England a man who holds the opinion that prayer,—I mean prayer in the sense of entreaty and supplication to the Almighty,—is no part of duty, but is superfluous; who considers, moreover, that there is not any day of the week which ought to be observed as a Sabbath, as a day of peculiar rest, or as one of peculiar holiness or in any manner distinct from other days, must be deemed to entertain opinions noxious to society, adverse to civilization, opposed to the usages of Christianity, contrary (in the case of prayer at least) to the express commands of the New Testament, and finally, pernicious in the highest degree to the young person unhappy enough to be imbued with them. I say in England. If this is a just view of such opinions, they must disqualify him who avows them and carries them into practice for the education and, in my judgment, for the guardianship of an English child, whether his own son or the son of any other person—an observation if liable to any exception or qualification, I apprehend to be liable to an exception or qualification in the single and unlikely case of a moral certainty or high degree of probability existing, that such opinions will not be communicated to the child—that the child will escape the infection—that he will remain untainted. But these opinions are avowed by Mr. Thomas to be his own, and such as he carries into practice. He has not professed any intention of not communicating them to his son if placed under his charge; and, had such an intention been expressed, I should, I own, have thought it even if possible, yet of very improbable performance. In this respect I might, perhaps, have found myself alone upon Mr. Thomas's address to the Court, delivered upon the hearing of the petition, to which I listened carefully.

Whether upon or without consideration of that address, however, I view the affidavits as containing evidence decisive upon this point—evidence which, coupled with some few passages, I think it right to state in very words. And, first, I take up two affidavits, made then and there by six of the Agapemonians. Three

of these six describe themselves as “clerks,” that is, clergymen, one of them being, I believe, the brother-in-law of the “servant of the Lord,” who is not a deponent in either of the affidavits, nor a witness at all; but his wife is one of the six whom I have just mentioned. This lady describes herself as Julia Prince, wife of Henry James Prince, of the same place, clerk, (the same place being “Agapemone.”) There is also another lady among the six, who all depose that “the statement that the said Henry James Prince and his followers, as asserted in the petition, used expressions of contempt and derision with regard to the holy Scriptures, is a wicked, hideous, and diabolical lie, which they cannot too indignantly repel; that the said Henry James Prince was not in the habit of stating at any meetings, to the persons assembled, that all their relations and friends who did not acknowledge the Spirit of God in him would be eternally damned; that it is utterly false, and a wicked perversion of truth, that people were admitted to the tea meeting upon the grounds of their rejoicing in the damnation of their friends; that the moral conduct of the said George Robinson Thomas is and always has been most exemplary and free from imputation, and his manners mild and gentlemanly; that deponents and others amused themselves in various ways, both for health and exercise, and that they sometimes play at ‘hockey,’ which is not a game like foot-ball, and which deponents consider very ridiculous to be obliged to refer to; that deponents do not regard one day from another, but every day alike, and each unto the Lord; that the said Henry James Prince has not propounded any blasphemous or irreligious doctrines: and to assert that he has a divine character, and is a proper object of worship, is a blasphemous and hideous lie; that the servants of the said Henry James Prince have, by his direction, threatened to let loose the bloodhounds upon any one coming within the walls, is a direct falsehood; that deponents are not under the influence or controul of the said Henry James Prince, but enjoy the most perfect liberty: their life is the purity of truth, their dwelling the rest of holy love, and their delight the glory of God: their peace is like a river, and their

strength the munition of rocks." I have read from one only of the two affidavits, because what I have read from it represents almost with substantial, if not literal, accuracy the corresponding passages of the other. Mrs. Thomas's three sisters, Harriet Lancaster Price, Clara Cobbe, and Louisa Nottidge, who are in the establishment, have joined in an affidavit in these terms:—"They say that they are the sisters of Agnes Thomas, the mother of the infant; that they did, in the year 1842, attend the ministry of the Rev. Henry James Prince, at Stoke, near Clare, Suffolk, and were greatly blessed by it; that they were also privileged to visit the said Henry James Prince and the Rev. Samuel Starky at their residence, but that they were not ever requested by the said Henry James Prince and the Rev. Samuel Starky, or either of them, to do so; that, on the contrary, it was the constant and repeated request of deponents and of the said Agnes Thomas that they might be allowed to do so; that the preaching of the said Henry James Prince was in truth, in simplicity, and in power; that his godliness was real, his exhortations faithful; but that he or the said Samuel Starky ever assured deponents that, in order to become true Christians, they must disregard the advice of their parents and other members of their family, and obey the directions of the said Henry James Prince, is a gross falsehood. The deponents Harriet Lancaster Price and Clara Cobbe say, that deponents married their respective husbands, not by command or at the request of the said Rev. Henry James Prince, but purely of their own free choice; that the said Henry James Prince extorted from either a promise to marry is a gross falsehood; that the said Henry James Prince was not present at their interview with the said Emily Nottidge and Frederick Peter Ripley at Swansea, nor was he at that time at Swansea, but at such interview, as at all other times, they acted according to their own free and unfettered will; that deponents were informed, by the direction of the said Henry James Prince, that there was no longer any occasion for their reading the Bible, as their husbands were now their Bibles, and that deponents would know through them the will of God as made known to them by the said Henry

James Prince, is false; that deponents and the said Agnes Thomas were not compelled to employ themselves the greater part of the night of the 4th of February 1846, in packing their husbands' clothes, nor were they engaged in such packing more than one hour, the things required being linen, &c. for a few days; and that they never understood that they were not to see their husbands again; that the said Agnes Thomas was not treated rudely or harshly by the said Thomas Williams in the month of February 1846, but that, in consequence of her temper and disposition at the time, there could be no pleasant communication between her and those residing in the same house: and that the said Agnes Thomas frequently acknowledged to deponents that she was in a state of rebellion against God, and expressed a desire openly to acknowledge it for the examples of others. Deponents say, and particularly the said Harriet Lancaster Price further says and affirms, that the said Harriet Lancaster Price did not go to North Curry, to Mr. Rouse's house, to be confined, by the direction of the said Henry James Prince, but of her own choice, and because there was no spare room at Charlinch, and also there being medical attendance and assistance on the spot at North Curry; that whilst at North Curry the said Harriet Lancaster Price received the greatest possible attention and kindness from Mr. and Mrs. Rouse and their servants, the medical man, and her own nurse; that she was visited after her confinement by her sister, the said Clara Cobbe, and the said George Robinson Thomas, and others of her friends, and that she had every comfort that she could possibly require; that the assertion, that when the child of the said Harriet Lancaster Price was one month old, she was required by the said Rev. Henry James Prince to give up the charge of such child to some person appointed by him to receive the same, and that she did so accordingly, and that in a few months afterwards it was reported amongst his followers that such child was dead, is a most wicked and diabolical lie, and the inference intended to be deduced therefrom deponents denounce as most malicious and abominable; that the child was attended by the monthly nurse, and came with her to Charlinch shortly after the return thither of the

said Harriet Lancaster Price, and was there constantly with her and her sister, and died within her (the mother's) arms; that deponents went to Rosehill in the month of March 1850, of their own accord, in order to obtain an interview with the said Agnes Thomas or Mrs. Nottidge, and that they were not sent there by the said Henry James Prince, nor had they any intention of carrying away the infant. Deponent Harriet Lancaster Price saith, that the statement, that she was deterred by the fear of exciting the anger of the said Thomas Williams, from rendering to the said Agnes Thomas any assistance in packing and preparing to leave Weymouth, and from bidding her farewell, is a gross falsehood; that deponent did assist her all the time of her said packing and preparing, and got up to make breakfast for her, and did bid her farewell. Deponent Louisa Nottidge saith, that she left Rosehill of her own accord and by her own desire, and that she previously acquainted the said Emily Nottidge and Cornelia Nottidge of her intention to do so, and they assisted in packing her things; that in the month of November 1846, deponent was residing at her own lodgings in Spaxton aforesaid, and that the said Frederick Peter Ripley and one Edmund Nottidge abruptly broke in upon her, carried her off by force, and took her to London, and imprisoned her in a madhouse for more than eighteen months, when she was released in consequence of the correspondence which the said George Robinson Thomas and Lewis Price had with the Commissioners touching the injustice and cruelty of her illegal imprisonment, and which was the cause of the action of trespass tried in June 1849; that during the tyrannical and cruel imprisonment of deponent all communication between her and her sisters, 'whom she loved,' was forcibly cut off, and several applications were made by the sisters and brothers-in-law of deponent to the said Frederick Peter Ripley and the said Emily Nottidge, but with no success; that the conduct of the said Emily Nottidge, Frederick Peter Ripley, and his wife, to deponent whilst confined, and though deponent complained to them of their cruelty, was most insulting and disgraceful, and was calculated, through

their attempts to work upon her mind and feelings, sometimes by entreaties, and sometimes by harsh cruel threats, and by reading and speaking the most disgusting, and as deponent has since discovered, false things, to make her indeed a lunatic, which they falsely asserted her to be; that deponent did, on her release, transfer the stock, part of which stood in her name, and another part in the name of herself and Josias Nottidge, deceased, into the name of the said Henry James Prince of her own accord, without the knowledge of the said Henry James Prince, whereby she enjoys more of the benefit of it than ever she did before. Deponents say, that to aver that the said Henry James Prince and his followers, as asserted in the petition, used expressions of contempt and derision with respect to the holy Scriptures, is a wicked, hideous, and diabolical lie, and which they cannot too indignantly repel." Mrs. Thomas, whose affidavit I have considered receivable upon a proceeding of the present nature, though her husband is the respondent, deposes as follows:—"That during the latter part of 1845 the said Henry James Prince was in the habit of holding meetings at various villages near Weymouth, whereat he and his leading followers preached, and that sometimes one and sometimes another of the said George Robinson Thomas, Lewis Price, and Thomas Williams, did, by the direction of the said Henry James Prince, usually preach, and announce to the persons assembled thereat the immediate coming of Christ, and exclaim in the loudest tone, 'Behold, He cometh! He cometh!'" And a little further on, "And the said Henry James Prince, in the latter part of 1845, frequently professed the doctrine, that the practice of prayer, whether private or public, is useless, and ought to be abandoned, and he required his followers to abandon such practice accordingly; and I have been informed, and verily believe, that the last-mentioned doctrine has ever since been, and now is, professed by the said Henry James Prince and his followers." And again, she says, "And I have been informed and verily believe that during part of the year 1846 the said Henry James Prince and his principal fol-

lowers, including the said Samuel Starky and his wife, the said Thomas Williams and his wife, and the said George Robinson Thomas, Lewis Price, William Cobbe, and Clara Cobbe, resided at Charlinch aforesaid, and during the latter part of the same year at Weymouth; and that ever since the early part of the year 1847 the said Henry James Prince and his principal followers of both sexes, to the number of thirty and upwards, including the said Samuel Starky and his wife, the said Thomas Williams and his wife, and the said George Robinson Thomas, Lewis Price, William Cobbe, and Clara Cobbe, have resided together in a large building at Charlinch aforesaid, which building the said Henry James Prince had caused to be prepared and to which he gave the name of 'Agapemone'; and that such building together with certain outbuildings and yards attached thereto, was and is surrounded by high thick walls; and that at the top of such building a flag is usually displayed bearing thereon a representation of a lion and a lamb, and an inscription in the words following—'Oh hail! holy love!' Say, that I have been informed and verily believe that the said Henry James Prince and his followers continue to profess the same doctrines which were professed by him and them in 1845 and 1846 as aforesaid; and that he and they by his direction, have likewise adopted and profess a doctrine, that neither Sunday nor any other day of the week ought to be observed as a Sabbath, or day of rest, or sacred day; and I have been informed and verily believe that the men, and many of the women, resident in the said building called 'Agapemone' have, by the direction of the said Henry James Prince, adopted and pursued a practice of playing together at various athletic games, and among others, at a game called 'hockey' resembling football, and of playing at such games as well on Sundays as on other days; and that in order more fully to act upon the aforesaid doctrine as to the uselessness of prayer, the said Henry James Prince in or before the year 1849, as I have been informed, and verily believe, caused a building adjoining the said 'Agapemone,' which had been fitted up as a chapel, to be

altered into an ordinary room; and that the said Henry James Prince has for some time past not attended any place of worship." And again, a little further on, "Say that, as I have been informed and believe, the income derived by the said Henry James Prince from his own property does not exceed 400*l.* a-year, but that by means of large sums of money which he obtains from his followers he has, since he established himself in the said 'Agapemone,' been enabled to live in an expensive manner, and to keep a carriage, and four horses for drawing the same, and several handsome saddle-horses; and he has been in the habit of riding in the neighbourhood of Charlinch in the said carriage drawn by four horses; also of riding out in such neighbourhood attended by a large cavalcade of his followers, and being himself on such occasions usually mounted on a handsome horse to which he has given the name of 'Glory.'" Cornelia Nottidge in her affidavit says, "I have been informed and believe that the said Henry James Prince professed a doctrine that the practice of prayer, whether public or private, is useless and ought to be abandoned; and he required his followers to abandon such practice accordingly; and I have been informed and verily believe, that the last-mentioned doctrine is now professed by the said Henry James Prince and his followers Say, that I have been informed, and verily believe, that the said Henry James Prince and his followers have likewise adopted and profess a doctrine, that neither Sunday nor any other day of the week ought to be observed as a Sabbath, or day of rest, or sacred day; and I have been informed, and believe, that the men, and many of the women, resident in a building called 'The Agapemone,' where the said Henry James Prince and his followers now reside, have, by the direction of the said Henry James Prince, adopted and pursued a practice of playing together at various athletic games, and, amongst others, at a game called 'hockey,' and of playing at such games as well on Sundays as on other days; and that, in order more fully to act upon the aforesaid doctrine as to the uselessness of prayer, the said Henry James

Prince, in or before the year 1849, as I have been informed, and verily believe, caused a building adjoining the 'Agapemone,' which had been fitted up as a chapel, to be altered into an ordinary room or sitting room; and the said Henry James Prince has for some time past not attended, and does not attend, and his followers, by his direction, have for some time past not attended, and do not attend, divine service or any place of worship." Mr. Maynard, who is the solicitor of the next friend of the infant, but probably not more biassed than the other deponents on either side, if so much, and is a man of standing and repute in his profession, and I think a trustworthy witness, deposes thus:—"I was employed as solicitor in the action of *Ripley v. Nottidge*, tried on the 23rd of June 1849." He then says, that "at the trial, Thomas, Cobbe and Prince all concurred in stating that they abjured all prayer; that they considered that the day of grace was past, and that the day of judgment had arrived; that they made no distinction between Sunday and any other day, and that they and the other residents in the establishment, male as well as female, did as they pleased on Sundays, and enjoyed healthful exercises, and, amongst others, played at 'hockey;' and that a building which had previously been a chapel had been converted into a residence." Mr. Thomas himself has made two affidavits. In the first affidavit he says, "I and others at the Agapemone amuse ourselves in various ways, both for health and exercise, and we sometimes did so with 'hockey,' which is a game like football, and we did so on Sundays and other days. I do not regard one day more than another, but every day alike, and each day unto the Lord. The said Henry James Prince has not, to my knowledge or belief, propounded any blasphemous or irreligious doctrines; and I solemnly deny that he teaches his followers that he has a divine character, and is a proper object of worship, or that his followers treat him as a proper object of worship." In his second affidavit is the following passage:—"I say that the said Henry James Prince, and I and many of those called in the petition his followers, were

pre-eminently distinguished as men of prayer; but, as the consequences of holding that the day of grace is past, and the day of judgment commenced, the said Henry James Prince, and I and others of his friends, discontinued the use of prayer as a means of communion with God, although I maintain that I am still in intimate communion with Him."

In such a case, seeing the probability or certainty, as I have said, that a sufficient provision for the maintenance and education of this boy is or will be made, independently of his father's resources, it appears to me, that, consistently with the law of England, as declared and enforced in the Court of Chancery since and before the time of Lord Eldon, as well as in more than one important case by Lord Eldon himself, I cannot decline interfering to avert from the country the infliction of such a citizen, and from the child such ruin temporally, and such spiritual peril, as his father's threatened care must, I think, without a miracle, produce. I make an order, therefore, substantially such as that asked by the petition.

The order made will be as follows:—Refer it to the Master to inquire whether there exists any provision for the maintenance and education of the infant petitioner during his minority, independently of any allowance or contribution from his father, and of what nature. If the Master shall be of opinion in the affirmative, he is to approve of some proposal to be laid before him for securing such maintenance for the petitioner, and he is to approve of some proper person to act as guardian to the petitioner, and to approve of a proper scheme for the residence, maintenance, and education of the infant until further order; and in the mean time, or until further order, the petitioner shall remain in the care and custody of the mother and maternal grandmother; and the father and his agents, till further order, must be restrained from removing or changing the custody of, the petitioner, or interfering with the same. All the parties to be at liberty to apply to the Court as they may be advised.

L.C. }
Feb. 18. } PURCHASE v. SHALLIS.

Will—Construction—Misdescription of Bequest.

A testator bequeathed to his sister P. "an annuity of 21l. a year, which I purchased of J. G." At the date of his will, and the time of his death, the testator had no annuity of 21l. a year, but he had an annuity of 46l. a year, which he purchased of J. G. for 300l., and he had insured the life of J. G. for that amount, at a yearly premium of 25l., and he had entered this annuity in his books as "300l. lent to J. G. at 7l. per cent. 21l.; 25l. premium on policy of assurance for 300l."—Held, that under the form of the bequest P. was entitled to the entire annuity of 46l.

Where the thing intended to be given is sufficiently indicated, an additional erroneous description of the value of the subject-matter will not vitiate the gift.

This was an appeal from a decree of the Vice Chancellor of England. The question arose upon a bequest contained in the will of John Shallis, which was as follows:—"I give to my sister, Mrs. Maria Purchase, a leasehold house being No. 51, Cloudesley Terrace, Islington, and an annuity of 21l. per annum, which I purchased of and receive from Mr. John Gibbon. Mrs. Maria Purchase is to have the rent of the house and this annuity for her life; at her death they shall become the property of her children; the rent of the house and the interest of the annuity shall be for the sole use and benefit of Mrs. Maria Purchase, and shall not be under the controul of any future husband." The testator, after making various other specific and pecuniary bequests, gave all the residue of his real and personal estate unto his brother James Shallis, and appointed his said brother and Thomas Foster, executors of his will. The testator died in September 1833. It appeared that at the time of making his will and at the time of his death, the testator was not possessed of or entitled to any annuity of 21l., but that by an indenture of the 7th of October 1829, made between John Gibbon of the first part, the testator of the second

part, and J. S., a trustee, of the third part, in consideration of 300l. paid by the testator to John Gibbon, John Gibbon granted to the testator, his executors, administrators and assigns, an annuity of 46l. during the life of him, John Gibbon, payable quarterly; and John Gibbon thereby covenanted with the testator that he would do all such acts as should be necessary to enable the testator, his executors, administrators or assigns, to insure the life of him, the said John Gibbon. Subsequently, the testator effected a policy of assurance with the Eagle Life Assurance Company on the life of John Gibbon for the sum of 300l., at a premium of 25l. a year, and continued the payment of such premiums up to the time of his decease. After the testator's death his executors kept on foot the said policy of insurance, and in their half-yearly accounts rendered to Mrs. Maria Purchase, credited her with the full amount of the annuity of 46l., and debited her with the yearly sum of 25l. as the premium paid on the said assurance. In October 1844 John Gibbon died, and shortly afterwards James Shallis received the monies payable in respect of the said policy.

In April 1848 Maria Purchase filed her bill against James Shallis and Thomas Foster (the executors of John Shallis, the testator), and against her three children, who were now of age and *sui juris*, claiming to be entitled, under the will, to the whole of the annuity of 46l., and all monies payable in respect thereof, from the death of the testator to the death of J. Gibbon; and also to the benefit of the policy of assurance; and that the accounts might be taken, with half-yearly rests.

It appeared from entries in the testator's own books that he was possessed of other annuities besides the one in question, and had effected insurances on the lives of the grantors respectively, and that he always described each annuity at an amount minus the charge for insuring the life of the grantor in each case respectively, *e.g.* "Lent J. Gibbon 300l. upon annuity at 7l. per cent. interest. 25l. premium on policy of assurance for 300l."

The cause coming on to be heard before the Vice Chancellor of England, his Honour declared that the plaintiff was entitled to

the entire annuity of 46*l.*, and ordered that the arrears should be paid, with interest, and the accounts be taken, with rests.

The defendants, the executors, appealed from the whole decree.

Mr. Bethell and *Mr. Bazalgette*, for the plaintiff.—Where there is no dispute as to there being but one subject-matter, but there is an error in part of the description of that subject-matter, the erroneous part of the description is rejected, and the remainder is sufficient to pass the subject.

Miller v. Travers, 8 Bing. 244.

Selwood v. Mildmay, 3 Ves. 306.

Wigram on Wills, pp. 54, 55, 3rd edit.

Day v. Trig, 1 P. Wms. 286.

Doe d. Beach v. the Earl of Jersey, 1 B. & Ald. 550.

Courtney v. Ferrers, 1 Sim. 137; s. c. 5 Law J. Rep. Chanc. 107.

Parkes v. Bott, 9 Sim. 388; s. c. 8 Law J. Rep. (N.S.) Chanc. 14.

Carver v. Bowles, 2 R. & M. 304.

Le Gros v. Cockerell, 5 Sim. 384.

Mr. Lloyd and *Mr. J. H. Law*, for the defendants in the same interest.

Mr. Rolt and *Mr. Hetherington*, for the appellants.—If there is any subject-matter to answer this, which is called a false description, then the rule relied on for the plaintiff will not apply—*Wigram on Wills*, p. 12, prop. 3. The testator's method of keeping the account of his annuities clearly shews what he intended to pass by this bequest: viz., a sum of 21*l.* only: the additional 25*l.* was to be considered as a security for the repayment of the purchase-money—*D'Aglié v. Fryer* (1).

The LORD CHANCELLOR.—It is quite clear that the testator intended to give what he himself received. He received 21*l.* a year interest in money, but he also received the benefit of 25*l.* a year interest, which he vested in a policy of assurance. It is an annuity of 46*l.* a year. He insures the life of the grantor, and pays a premium of 25*l.* a year for that. Then, in order to keep separate the profit and the expense, he divides the annuity into two sums. He

considers the annuity as an entire thing; but he divides it into 21*l.* a year profit and 25*l.* a year to be paid out of the annuity, in order to make it perpetual, that is, to secure a return of the purchase-money upon the expiration of the life. There is no decided case like the present; the one last cited comes the nearest.

It may be always a matter of considerable difficulty, but obviously the question is, what is the principal description? The Vice Chancellor, in that case, thought the principal description was 50*l.* a year long annuities; that being the thing given, it would not affect the case that an additional description was given which was erroneous. Where the thing described is considered as sufficiently clear, there the erroneous description will not hurt. Here the gift is of "an annuity of 21*l.* a year, which I purchased and receive of John Gibbon." There is no annuity of 21*l.* a year purchased of John Gibbon; but there is an annuity of 46*l.* purchased of him, and that is only reduced to 21*l.* by payment of the insurance premium. Still the annuity given is that purchased of John Gibbon, and two of the entries in the testator's books are read to shew how the testator thought proper to deal with it.

As far as regards himself, the testator dealt rightly with it, for he only got 21*l.* a year; but then he insured the principal. You will not be putting the legatee into the same position if you only give her the 21*l.* a year, for she will not have the means of keeping up the policy. There is no case cited, nor do I think that any can be produced, where there is a clear distinct gift of the subject-matter, and an erroneous description of the extent in value of it, in which the erroneous description has been held to vitiate the gift. Here is a perfect description of it, as "the annuity purchased of John Gibbon," but an erroneous or rather fanciful description of it, as an "annuity of 21*l.* a year." The Vice Chancellor rightly held, that the policy did not go in the gift; and if it did not, what is there to cut down this annuity to 21*l.* a-year? which, indeed, is only warranted by the way in which the testator himself dealt with it. This inaccurate description is, I think, well explained by the mode in which the tes-

tator treated it in his accounts. What the testator might have done, if his attention had been drawn to it, we have no means of judging; but the only way of reducing it would have been by stating it as "an annuity of 21*l.*, part of what I purchased of J. Gibbon;" but no such words are found in the gift. The annuity is given as an entire thing. If a man gives a farm or house and inaccurately describes the rent, the inaccurate description of the rent cannot vitiate the gift itself. Here is a full description of the thing given, and an inaccurate mode of estimating the money to be received upon it. There is no rule of construction which would justify me in saying that 21*l.* a-year can be the whole amount of the bequest; the gift being, not a part of the annuity, but the annuity itself.

I do not understand how the question of rests is to be supported. The personal representatives, who received the annuity, ought to have paid over the whole to the plaintiff. A question was raised upon the right, and in the opinion of the Court the executors came to an inaccurate conclusion upon this point. The money, however, actually came into their possession; the interest therefore of the money so retained by them must belong to the annuitant. But it is unusual to fix a party with compound interest or rests, unless there is a case of breach of trust or wilful default. Here the money was withheld under a claim of right, which was a fair claim to be raised. The decree must be altered so far as goes to the disallowance of rests; but interest must be paid upon the sums retained. I think, under the circumstances, that as the decree for rests was not objected to at the time, and constitutes a very small part of the case, the appeal must be still dismissed, with costs.

L.C. }
Jan. 26. } SERGROVE v. MAYHEW.

Insolvency, Plea of by a Co-defendant after Bill filed.

To a bill filed against A. & B, solicitors in partnership, in respect of a joint liability, A. pleaded an order of the Insolvent Debtors

Court, made subsequently to the filing of the bill, by which all the estate and effects of B. became vested in the provisional assignee of that court. The plea was allowed.

The bill in this case, which was filed on the 21st of February 1849, against Mayhew & Reynolds, who were in co-partnership as attornies and solicitors, raised a demand against the defendants, in their partnership capacity. After both the defendants had appeared to the bill, the defendant Mayhew put in a plea, which stated that since the filing of the bill, his co-defendant Reynolds had taken the benefit of the Insolvent Acts, and that by an order of the Insolvent Debtors Court, made on the 17th of March 1849, Samuel Sturgis was appointed the official assignee of the estate and effects of the defendant Reynolds, and that thereupon all the estate and effects of Reynolds became vested in Sturgis, and that he ought to be a party to the bill. The Vice Chancellor of England overruled the plea, and the defendant Mayhew appealed from that order.

Mr. Rolt and Mr. Glasse, for the appeal. —In *Turner v. Robinson* (1) the defendant pleaded his own bankruptcy, which occurred subsequently to the institution of the suit, and the plea was allowed. The same principle will apply to the present case, for the defendant is not bound to put in an answer to a suit which cannot be carried to an effective hearing—*Tarleton v. Hornby* (2). A plea of want of parties is a plea in bar—*Plunket v. Penson* (3).

Mr. Malins and Mr. Chichester, for the bill.—A defendant may plead the disqualification of the plaintiff to sue or his own incapacity to be sued; but here the effect of the plea merely amounts to this, that the plaintiff ought to have filed a supplemental bill to bring Sturgis before the Court; which is rather an objection to be taken at the hearing. If the argument of the appellant is to prevail, it will be in the power of any defendant to plead want of parties, and thus prevent the suit from

- (1) 1 Sim. & S. 3.
- (2) 1 You. & C. 333.
- (3) 2 Atk. 51.

being brought to a hearing. The plea is useless, for if the plaintiff does not set himself right before the hearing, the bill will be dismissed.

The LORD CHANCELLOR.—In this case the suit became imperfect before the defendant was called upon to make his defence. The cases which have been referred to shew clearly that matters occurring subsequently to the filing of the bill which incapacitate parties from suing or being sued, may be the subject of a plea; and that the practice is perfectly legitimate. The same principle applies to the case of a release executed after the filing of the bill. The whole effect of the plea is to shew that, as the matter stands, the suit cannot go on. It is no objection to the plea that the incapacity arose after the bill was filed. The Vice Chancellor's order must, therefore, be discharged, and the usual order made upon allowing a plea, with liberty to the plaintiff to file a supplemental bill.

L.C. }
Feb. 16, 23. } *In re FISHER, A LUNATIC.*

Lunatic—Maintenance—Purchase of a Government Annuity.

Where the whole income of the lunatic amounted only to 21l. 16s. 11d., being the dividends arising out of a sum of stock to which the lunatic was entitled, the Court allowed an annuity of 30l. for the life of the lunatic to be purchased and paid for out of the fund.

On the 16th of August 1849, under a commission for that purpose issued, Elizabeth Fisher was found to be a person of unsound mind from the 14th of July 1848. The Master, by his report, found the heir-at-law and the next-of-kin of the lunatic, and that the lunatic was a spinster of the age of forty-nine years, and that her property consisted of a sum of 750l. consolidated bank annuities. And he found that the income of the lunatic amounted to the sum of 21l. 16s. 11d., being the annual amount of the dividends upon that sum. And he found that the charge for the maintenance

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of the said Elizabeth Fisher, at Miles's Asylum at Hoxton, had been at the rate of 1l. 1s. per week, and he was of opinion that the whole income of her fortune should be allowed for her maintenance; and that George Fisher, her only brother, and Lucy Frost, her half sister, were fit and proper persons to be appointed committees of her estate and effects. The petition, which was presented by the heir-at-law and the next-of-kin and the committees, stated that the lunatic had been placed upon the list of incurable patients at St. Luke's Hospital, and that the petitioners had been informed and believed that there was every probability of her being admitted into the said hospital upon the incurable list within three years, upon the payment of a weekly sum of 7s.; and the petition prayed, among other things, that the whole income of the lunatic might be allowed for her maintenance, and that until she should be admitted into St. Luke's Hospital as aforesaid, the annual sum of 60l. might be ordered to be paid or allowed for her maintenance out of the said dividends and by the sale from time to time of a competent part of the said bank annuities.

Mr. Hardy, for the petition.

The LORD CHANCELLOR refused to make an order for the additional interest of 60l. a-year.

Mr. Hardy, on the 23rd of February, applied to vary the order, by directing that the committees might be authorized, out of the sum of bank annuities belonging to the lunatic, to purchase an annuity of 30l. a year, for the life of the lunatic, by way of increasing the maintenance.

By the affidavit in support of the application it appeared that such an annuity might be purchased in "The West London Savings Bank and Government Annuity Institution" for the sum of 397l. 12s. and 30s. fees of the office.

The LORD CHANCELLOR made the order.

WIGRAM, V.C. }
 Jan. 30, 31; } BECKITT v. BILLBOROUGH.
 Feb. 7. }

Company — Scripholder — Registered Shareholder—Trustee and Cestui que Trust —Subject-Matter of Suit, Trifling Amount of—Costs.

The allottee of scrip in a provisionally registered public joint-stock company sold the scrip certificates in the market, and, after the company obtained its act of parliament, and in default of the scripholder claiming to be registered within the time required by the company, was registered as the owner, and received sealed certificates of the shares. He subsequently paid calls and sold the shares in the market:—Held, that the allottee was trustee of the shares standing in his name for the purchaser of the scrip certificates.

The plaintiff (the purchaser of the scrip) discovering from the answer of the defendant (the allottee) that the amount received for the shares was only 9l., and having previously grounds for supposing that a larger amount might be recovered, offered to abandon the suit upon payment of the 9l. and his costs. The defendant refused, and the Court decreed payment to the plaintiff of the 9l. and costs of the suit.

This was a suit for an account of the proceeds of the sale of ten shares in the North-Western Railway Company. The defendant was the original allottee of the shares when the company was only provisionally registered (1845), and had sold the scrip (upon which he had paid a deposit of 1l. 2s. per share) to brokers at Liverpool for 54l. The scrip, after passing through various hands, was purchased by the plaintiff for 6l. 15s. per share (67l. 10s.). The company was subsequently incorporated by act of parliament, and it then advertised in the *Railway Times*, *Railway Record*, and certain local newspapers, that the scripholders were to send in their scrip to the secretary for the purpose of registry, and that the share-register required by the Companies Clauses Consolidation Act (1)

would be closed in the September following. The plaintiff not having sent in his scrip pursuant to the advertisement, the defendant was registered in the books of the company as the owner of the ten shares in October 1846, and sealed certificates thereof were delivered to him. A call of 1l. 8s. per share having been made (payable on the 4th of November following) the defendant on the 26th of October 1846 sold the ten shares in the market for 18s. per share, the purchaser paying the calls, and the shares being then at a discount of 4s. per share. In January 1847, the plaintiff having ascertained at the office of the company that the defendant was the registered owner of the shares, applied to him by letter for the delivery of the sealed certificates of them, and offered to repay the amount of any calls paid in respect of them. To this letter the defendant did not reply. In March 1847, a second call of 1l. 10s. per share was made, amounting, with the previous call, to 2l. 18s. per share. In June 1847, the plaintiff again applied by letter to the defendant requiring an account of the proceeds of the shares, and threatening proceedings in Chancery in case of non-compliance with his request. In reply to this application, the defendant wrote to the plaintiff, denying his liability to account, and stating that the shares had been sold, but that the same number might be then purchased by the plaintiff in the market for 2l. 16s. per share, being 2s. less than the amount of the calls already paid on each.

The present bill was then filed, praying that the defendant might be decreed to account to the plaintiff for the proceeds of sale of the shares, with such further sum as might have been received if they had been sold at the highest marketable price (2l. 5s. per share premium) reached by them since the defendant was registered as the owner, the plaintiff offering to repay him all sums paid by him for calls and to give such indemnity in respect of the shares as the Court should direct.

It appearing, by the answer of the defendant, that the amount in litigation was only 18s. per share, or 9l. in the whole, exclusive of the calls, the plaintiff offered to abandon the suit on payment of that sum

and the costs then incurred. This offer was refused by the defendant.

Mr. Wood and *Mr. Winstanley*, for the plaintiff, argued that the sale of the scrip was legal—*Young v. Smith* (2), and that the purchaser had a right in equity to be registered as the shareholder, the company having treated the scripholders as being entitled to be registered—*The London Grand Junction Railway Company v. Freeman* (3), *The Midland Great Western Railway Company v. Gordon* (4). The defendant was a trustee for the plaintiff, and liable to the account prayed, and might have compelled the plaintiff to be registered—*Duncuft v. Albrecht* (5). The plaintiff had offered to indemnify the defendant in respect of the shares—*Shaw v. Fisher* (6), *Wynne v. Price* (7).

The Solicitor General (with whom was *Mr. Elmsley*), for the defendant, relied upon the laches of the plaintiff in not sending in the scrip for registry. The registering of the defendant was the act of the company—*Phené v. Gillan* (8). There was no mutuality between the plaintiff and the defendant—*Jackson v. Cocker* (9). Scrip passed by delivery, like a bank note, &c.; the transfer of it did not require registry, and it could not be followed. The sum realized by the shares was less than 10*l.*, and was too insignificant for a suit in equity.

Mr. Wood replied, and contended that there was no authority as to the insignificance of the subject-matter of a suit. Suits for sums of 5*l.* or 6*l.* it was stated in some old cases to be beneath the dignity of the Court to entertain—*Offley v. Whitehall* (10), *Nugent v. Smyth* (11).

(2) 15 Mee. & W. 121; s. c. 4 Rail. Cas. 135; 15 Law J. Rep. (n.s.) Exch. 81.

(3) 2 Man. & G. 606; s. c. 2 Sc. N.R. 705.

(4) 5 Rail. Ca. 76; s. c. 16 Law J. Rep. (n.s.) Exch. 166.

(5) 12 Sim. 189.

(6) 2 De Gex & Sm. 11; s. c. 5 Rail. Cas. 461.

(7) 5 Rail. Ca. 465.

(8) 5 Hare, 1; s. c. 15 Law J. Rep. (n.s.) Chanc. 65.

(9) 4 Beav. 59; s. c. 2 Rail. Ca. 368; 10 Law J. Rep. (n.s.) Chanc. 236.

(10) Bunb. 17.

(11) Mos. 354.

WIGRAM, V.C.—The case is clearly one in which this Court will interfere to give relief against the defendant as a trustee. Shares in a railway company cannot be considered as falling within the rule applied to money in the funds, in which sums of the same amount are considered to be equivalent. Shares may be specifically followed. On the question of costs, with reference to the small amount of the sum in dispute, I will reserve my judgment.

Feb. 7.—WIGRAM, V.C., after stating the above facts, said, the sum recovered by the plaintiff does not exceed 9*l.*, and the question I am asked to consider is, whether the plaintiff, who has elected to proceed in equity for 9*l.*, instead of proceeding at law by an action for the money, is entitled to his costs, which, it is admitted, are in the discretion of the Court, although by the general rule they follow the event of the suit. The plaintiff claims the costs under the general rule, and has shewn that at the time he filed his bill he had no information of the price at which the shares had been sold in the market by the defendant, but that he supposed he might have recovered the sum of 22*l.* 10*s.* It is argued for him that his ignorance of the price at which the defendant had actually sold the shares is attributable to an omission or neglect to answer the plaintiff's inquiries on the subject; a charge which, as regards the conduct of the defendant, is not without foundation. To that it is answered that the plaintiff might, by inquiry at the office of the company and by consulting the share list, have ascertained the time when the shares were sold and the price of them at the time of sale, and that the plaintiff ought therefore to be considered as having filed his bill with the knowledge that 9*l.* only could be recovered. To this the plaintiff rejoined, that it did not follow that the price at which the shares had been sold was contained in the books of the company, and that whether it was or not there were no means of compelling the company to inform the plaintiff of the amount for which the defendant had sold the shares. The plaintiff alleges that the defendant was bound to give him the information required, and that he refused to do so. To this may be added the fact that,

after the defendant had put in his answer, the plaintiff offered to abandon the suit upon payment of the sum due to him and the costs up to that time, which offer was not accepted. Under these circumstances, I think that the costs ought to follow the result of the suit. I shall therefore declare that the defendant is a trustee for the plaintiff, and order that the proceeds of the sale be paid to the plaintiff, the amount being admitted to be 9*l.*, subject to just allowances, together with the costs of the suit.

Decree accordingly.

M.R. }
May 28. } *In re* LORIMER.

Costs—Tenant for Life—10 & 11 Vict.
c. 96.

Under the act for the indemnity of trustees, a tenant for life petitioned for payment of the dividends to her:—Held, the general personal estate of the testatrix being exhausted, that the costs of the petition must be paid out of the income, and not out of the principal.

Susannah Lorimer, by her will, dated the 28th of March 1827, gave 1,000*l.* reduced annuities to Messrs. Wallace and Lyon, whom she appointed her executors, in trust during the life of her daughter, Margaret Graham, the wife of John Andrew Graham, of New York, America, to pay the dividends to such persons as her daughter notwithstanding her coverture should, by writing under her hand, appoint, and in default of appointment, into the proper hands of her daughter, and upon her single receipt for the same; and after her decease to pay the same dividends to her grandson, John Lorimer, the son of her daughter, Margaret Graham, for his life, and after his decease the 1,000*l.* was to be divided among all his children as therein mentioned.

Upon the decease of the testatrix, her will was proved by James Lyon alone, on the 22nd of February 1831, and he set apart the sum of 1,000*l.* reduced annuities to answer the bequest.

This sum afterwards became vested in Mary Ann and Hannah Lyon, and they, under the provisions of the 10 & 11 Vict.

c. 96, paid the amount into court, upon which a sum of 72*l.* 16*s.* 3*d.* had accrued due for dividends.

On the 1st of April 1850, Margaret Graham constituted Messrs. Baring Brothers & Co. her attornies to recover all such sums as should become due on account of any dividends upon the said sum of 1,000*l.* reduced annuities, and they now presented this petition, asking that a sum of 72*l.* 16*s.* 3*d.* cash and all dividends to accrue due on the 1,000*l.* reduced annuities might be paid to Messrs. Baring Brothers, or any or either of them, until further order. It also asked that the costs might be paid by a sale of a sufficient part of the principal.

Mr. Lloyd appeared in support of the petition.

THE MASTER OF THE ROLLS.—Why should not the costs of paying the money into court be paid out of the general estate of the testatrix?

Mr. J. H. Taylor.—The Misses Lyon are not the legal personal representatives of the testatrix whose estate has been administered. They could not be advised to part with the fund, and they have therefore paid it into court, by which act it has been completely secured, and appropriated for the parties entitled. There is, therefore, no fund for the payment of costs, and as this petition is for the benefit of the tenant for life, they ought to be paid out of the dividends and not out of the principal.

THE MASTER OF THE ROLLS.—I must make the order according to the prayer, except that as this petition is for the benefit of the tenant for life, I must direct the costs to be paid out of the dividends.

M.R. }
March 7; } *In re* SUDLOW AND KINGDON,
May 7, 30. } *ex parte* THE DOVER AND
DEAL RAILWAY COMPANY.

Costs—Order for Taxation—Railway Directors—Personal Undertaking, Liability on—Winding up Acts, 1848 and 1849.

On the application of four of the directors of a railway company, an order for the taxation of the bill of parliamentary agents was

made, under which the directors submitted to pay what should be found due to them. The bills were taxed at 224l. 1s. 8d., but before the certificate of the taxing Master was obtained a petition was presented and an order was made for winding up the company. Upon an application for an injunction to restrain the parliamentary agents from issuing any process against the directors,—Held, that their submitting to pay was a personal undertaking; and the injunction was refused, but without costs.

This was a motion, by Joseph Thompson, Lord Albert Conyngham, William Gore, and Henry William Beauclerk, directors of the Dover and Deal Railway Company, to restrain Messrs. Sudlow & Kingdon from issuing any execution or other process, or taking any proceedings whatever, under an order made on the 31st of January 1849 against them upon their undertaking, contained in the order, for enforcing payment of the sum found to be due to Messrs. Sudlow & Kingdon from the directors, by the Master's certificate, dated the 15th of February last.

In November 1845 Messrs. Sudlow & Kingdon were employed as parliamentary agents on behalf of the Dover and Deal Railway Company. On the 11th of December 1848 they delivered their bill of costs, charges, and disbursements. On the 31st of January 1849, upon the petition of the said directors of the railway company, the bills were referred to the taxing Master of the Court of Chancery, to tax and settle such bills, and under the order made the directors submitted to pay what should be found due to Messrs. Sudlow & Kingdon (1). On the 15th of February the taxing Master certified that he had taxed the bills, and found that 224l. 1s. 8d. was due from the directors to Messrs. Sudlow & Kingdon. On the 18th of February 1850 Messrs. Sudlow & Kingdon wrote to Mr. Hook, the solicitor of the directors, for a cheque for the amount. On the 25th of January 1850 an order was made, upon the petition of James Short, by the Vice Chancellor of England, under the Joint-Stock Companies Winding-up Acts, 1848 and 1849, 11 & 12 Vict. c. 45. and

12 & 13 Vict. c. 108, ordering that the Dover and Deal Railway Company should be wound up. On the 16th of February the Master appointed Henry Crossdill the official manager of the company.

Mr. Turner and Mr. Mackeson, in support of the motion.—The property and effects of the company have been taken from the hands of the directors by the Winding-up Act, 11 & 12 Vict. c. 45. ss. 19. and 29, which vests the estate, effects, and credits of the company in the official manager upon his appointment, and restrains the directors from interfering. The undertaking given by them was in the character of directors, and as such they would have been willing to discharge the demands; but they have ceased to have any controul over the funds of the company, and consequently no proceedings should be allowed against them, but Messrs. Sudlow & Kingdon should prove their debts before the Master.

Mr. Walpole, on behalf of Messrs. Sudlow & Kingdon.—The judgment given upon the application of the directors created no debt against the company, but the order for taxation was made upon their personal undertaking to pay. The 11 & 12 Vict. c. 45. s. 19, restraining the directors from parting with the assets, refers only to claims made against the company; and the 58th and 73rd sections support this view of the case. The directors who applied for taxation are therefore personally liable to pay the debt, and this application should be refused, with costs.

Mr. Turner, in reply.

May 7.—**THE MASTER OF THE ROLLS.**—Upon the order for the taxation of these costs, I consider that the directors gave their personal undertaking for payment of what should be found due, and their only means of reimbursement is by placing themselves in a situation to obtain repayment as for a debt paid for the company. I must, therefore, refuse the motion.

May 30.—*Mr. Walpole* asked for the costs.

THE MASTER OF THE ROLLS.—I shall not give any costs.

(1) 18 Law J. Rep. (N.S.) Chanc. 182.

M.R. }
 July 20. } CUST v. SOUTHEE.

Practice—Plea—Misnomer of Plaintiff.

A defendant by plea stated that the plaintiff J. H. H. C. was commonly called Viscount Alford, and not Viscount Alfred, as stated in the bill, and submitted to the Court whether he should make any further answer:—Held, that the defendant might have guarded himself from the error, and was not to be excused from answering; and that the plaintiff was not to be compelled to correct the error at the expense of giving the defendant further time to answer the bill: and the plea was overruled, with costs.

This plea was filed by the defendant, Robert Southee, on the ground that the plaintiff, John Hume Home Cust, was commonly called or known by the name or style of Viscount *Alford* and not by the name or style of Viscount *Alfred* as stated in the bill, and submitted to the Court whether he should make any further answer.

The bill was filed, on the 29th of April, by John Hume Home Cust, commonly called Viscount *Alford*, which by mistake was written *Alfred* in the engrossment, and others against Robert Southee and Thomas Newnham to obtain an account, and for the administration of the estate of William Chaplin, deceased.

In May an appearance was entered for the defendant, R. Southee, in the following form: "Robert Southee *ats.* John Hume Home Cust," (omitting commonly called Viscount *Alford*) and others.

On the 20th of June the defendant obtained a fortnight's time to answer, and served it upon the plaintiff, and at the same time informed the plaintiff of the error in the bill, and subsequently filed this plea.

Mr. Roundell Palmer and Mr. Prendergast, for the plea.—The misnomer in the bill may affect the defendants: supposing it is dismissed with costs, the subpoena will be of no avail in consequence of there being no such party; difficulties will, therefore, arise in the execution of the writ. It is also requisite to correctly entitle a suit before a witness can be convicted of per-

jury. These questions have been before the courts of law, and they have decided that it is proper to take the objection by plea—*Jones v. Macquillin* (1), *Morley v. Law* (2), *Digby v. Alexander* (3), and *Chandler v. Parkes* (4). The plaintiffs have had every opportunity given them to amend, but they would not, and this course is taken to compel them.

Mr. Turner and Mr. Baily, contra.—This is an attempt to get time to answer beyond that allowed by the rules of the Court; and also notwithstanding the 3 & 4 Will. 4. c. 42. s. 11, it is an attempt to re-establish technical strictness in pleading after it has been abolished at law. The name of the plaintiff is correct; the error is in the title used by courtesy; it is, therefore, absurd to say that the parties could not obtain relief. There is no instance of such a plea as this being filed; there are pleas to the person, but none for misnomer. The defendant does not plead that the plaintiff has given a misdescription of evidence; he admits also that he knows who the plaintiff is, and even supposing there was an indictment for perjury, the question would be whether the party was the person intended. It is difficult to ascertain what is meant by a plea in abatement—*Simpson v. Burton* (5), *Roberts v. Jones* (6), *Neck v. Gains* (7). The proper course for the plaintiff was to move to take the bill off the file, but in such a case as this it would not have been granted.

Mr. Roundell Palmer, in reply.—The defendant has a right to know the party seeking relief, and after that to be placed in the same position with regard to applications for security for costs, for time to answer or otherwise, as if the bill had been correctly filed. In the present state of the record, can the plaintiff compel a defendant to answer or proceed without amending? A motion to take the bill off the file would be more harsh than the plea;

(1) 5 Term Rep. 195.

(2) 2 Brod. & B. 34.

(3) 8 Bing. 416; s. c. 1 Mo. & Sco. 559; 1 Law J. Rep. (n.s.) C.P. 122.

(4) 3 Esp. 76.

(5) 1 Beav. 556; s. c. 8 Law J. Rep. (n.s.) Chanc. 328.

(6) 7 Beav. 57, 266; s. c. 13 Law J. Rep. (n.s.) Chanc. 32.

(7) 1 De Gex & Sm. 223.

but there is an absence of authority for such a proceeding: a plea in abatement is the proper course, and this proceeding is correct.

The MASTER OF THE ROLLS.—It is with surprise and regret that I see such a plea filed. Mistakes will sometimes happen, but in such cases the usual course is to state the name correctly, and add "in the bill by mistake called," &c., as stated erroneously in the bill. In this case there is evidently a clerical error, but I do not think the defendant can be excused from answering; he could have guarded himself against the error. Is, then, the plaintiff to be compelled to correct the error at the expense of so much time to be given to the defendant? I see no reason for it, and I must overrule the plea, with costs.

[See *Mitf. Plead.* 234, 4th edit.; *Lepara v. Sir J. Jermaine*, 3 Salk. 235; *Lord Ossulston's case*, 3 Salk. 336; *Nutton v. Crow*, 10 Mod. 283, 284; *Jefferies v. Snow*, Carth. 14.]

M.R. }
July 20. } WRIGHT v. CATTELL.

County Court—Jurisdiction of Court of Chancery—Petty Bag Office—Prohibition.

The Judges of the courts of common law being upon the circuit, a prohibition out of the Petty Bag Office was applied for and was granted by the Court of Chancery to the Judge of the County Court, to prevent him from carrying into execution a judgment obtained therein upon a matter stated not to be within its jurisdiction.

This was a motion for an order, or for a direction to the Clerk of the Petty Bag to issue a writ of prohibition to Frederick Trotter Dimsdale, Judge of the County Court of Warwick, holden at Warwick, to stop him from proceeding further with a judgment upon a plaint in that court, entitled between Jesse Wright plaintiff, and Isaac Cattell defendant.

Mr. Steere, in support of the motion.—

The application is made to this court as the Judges at common law are upon circuit, and the Judge at chambers has no jurisdiction in the matter. In such cases, therefore, where a party is sued for matter out of the jurisdiction of an inferior court, the Court of Chancery may grant a prohibition—*Anonymous* (1). The 11 & 12 Vict. c. 94. was passed to regulate the offices of the Petty Bag, and this has been amended by the 12 & 13 Vict. c. 109, and by section 34. it is provided that the superior courts of common law shall have the same powers as in actions in their courts; and by section 39. the Judges are to dispose of matters arising or incident to any action on the common law side of the Court of Chancery, but the 46th section saves the jurisdiction of the Lord Chancellor and the Master of the Rolls. It is also by section 48. provided, that the courts of common law shall take cognizance of the writs issued out of the Petty Bag Office. It is apparent, therefore, that the acts do not displace the ancient and undoubted jurisdiction of the Court of Chancery to issue the writ. The common law Judges have then power to hear and determine the question, and it is not necessary for them to make any return to this court. In this case execution is to issue on Monday. If this Court refuses the writ of prohibition, the defendant is without any means of correcting the error which he conceives has been made in the inferior court. But if the writ now asked for is obtained improperly, the plaintiff may obtain a rule calling upon the defendant to shew cause, before a Judge at common law, why the prohibition issued from the Petty Bag Office should not be set aside, or why a *supersedeas* should not issue.

[The MASTER OF THE ROLLS.—It would seem that I have still jurisdiction to issue the writ. What are the merits?]

Mr. Steere.—The defendant is sued for rent, but he denies that the plaintiff is the landlord. The question, therefore, is one concerning the title to land, and it falls within the 9 & 10 Vict. c. 95. s. 58, which pro-

(1) 1 P. Wms. 476. And see *Newhouse v. Milbank*, 1 Vern. 276; *Iveson v. Harris*, 7 Ves. 251 and 257; *Montgomery v. Blair*, 2 Scho. & Lef. 136.

(2) See now 12 & 13 Vict. c. 101.

vides that the County Court shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, &c. shall be in question; but notwithstanding this the Judge has made an order that he shall pay, and execution is to be issued on Monday.

The MASTER OF THE ROLLS.—I shall direct the writ of prohibition to be issued.

L.C. }
Feb. 8, 18; } CROSS v. SPRIGG.
May 2. }

Deed—Bond—Principal and Surety—Giving Time to the principal Debtor—Discharge of Surety.

The testator advanced 1,000l. to W. on his bond, in which J. joined as surety. W. becoming involved in his affairs, arranged with his creditors to pay 11s. in the pound, the testator guaranteeing the payment of the composition. The assets of W. would not have been sufficient for payment of the composition if the testator had enforced payment of his bond debt:—Held, upon appeal, that the effect of the transaction was to give time to the principal debtor, as the testator, after having joined in the compromise, could not have enforced his demand upon the bond to the disappointment of the trade creditors, and, consequently, that the surety was discharged.

This was an appeal from the decision of Wigram, V.C., reported in 18 *Law J. Rep.* (N.S.) Chanc. 204, where the facts are fully stated.

Mr. Teed and Mr. Hallett, in support of the appeal.

The Solicitor General and Mr. Glasse, contra.

The case having stood over, the Lord Chancellor, on the 2nd of May, delivered out the following judgment:—

The LORD CHANCELLOR.—This is one of those cases in which an unfortunate departure from the regular course has brought into discussion, and calls for a decision upon, a matter not in issue in the cause,

or capable of being disposed of by any adverse proceeding in it. The object of the suit and the purport of the decree were to take the usual accounts of the estate of a trader, Thomas Cross, and, as incidental thereto, to inquire of what his personal estate consisted. The Master reported that it consisted, amongst other things, of a sum of 1,000l., secured by a bond of William Gilbert, and for which the appellant, John Gilbert, and one Robert West Hyde were sureties, each as to one-third of the 1,000l. John Gilbert happened to be a party to the cause in another character, but not as connected with this bond; and Robert West Hyde was not a party to the cause; and it is obvious that, as sureties to the bond, they would not have been proper parties to the suit, and that the Court had no jurisdiction to compel payment by them of any part of the 1,000l., for which they might have become sureties. It appears, however, by the Master's report of the 3rd of August 1848, that the counsel for the appellant, John Gilbert, one of the sureties, induced the Court to direct the Master to inquire whether the appellant was liable to pay any part of the 1,000l. as surety for William Gilbert, the obligor, without any undertaking on his part to pay what, if anything, should be so due. The Master found that the appellant, John Gilbert, was not liable for any part of the 1,000l.; and in answer to another part of the decree, that it was not expedient that any proceedings should be taken to enforce payment by William Gilbert or Robert West Hyde of the 1,000l. This inquiry must have been ordered for the purpose of enabling the Court the better to give directions for the administration of the estate; for although a report that nothing was due from the principal debtor would operate in favour of the surety, yet the principal might well remain liable, although his surety had been discharged; and the whole case, so far as it might affect the surety, was open upon the inquiry as to his liability. To this report the plaintiff took exceptions, including the finding both as to the principal and the surety; and the Court having allowed the exceptions, the effect was a decision that the surety was liable for that proportion of the debt for

which he had undertaken; and the surety, John Gilbert, having alone appealed from that decretal order, that is the only question before me; but the argument before Vice Chancellor Wigram,, and his Honour's judgment, and the argument before me, turned principally upon the liability of William Gilbert, the principal. If the Court had been of opinion that the principal had been discharged, it would not have been material to consider the peculiar case of the surety; but having come to a contrary conclusion, the question whether the circumstances amounted to a discharge of the surety would appear to have called for a decision; because, if that were answered in the affirmative, John Gilbert, the exceptant and appellant, would not have had any interest in the other inquiry; and the exceptions raising the question as to his liability, ought, at all events, to have been overruled, although no practical result can arise from the finding either way in this cause. I do not, however, think, that after what has taken place, I ought, for that reason, to decline expressing my opinion upon that point. From the Master's report, and the evidence to which it refers, it appears that the testator having advanced 1,000*l.* to the said William Gilbert, to assist him in a partnership business, William Gilbert executed a bond to secure repayment of that sum; John Gilbert and Robert West Hyde becoming sureties each for one-third of that sum. The partnership business having become involved, William Gilbert agreed with his creditors to pay a composition to them of 1*l.*s. in the pound upon their debts; but the property of the business being insufficient to pay such composition, if the testator exacted payment of his 1,000*l.* bond debt, he agreed not to require payment, but to give it up altogether, and to guarantee to the creditors the composition of 1*l.*s. in the pound. The Master found that the surety was discharged, the transaction amounting to a giving of time to the principal; and in this opinion I concur. The question really is, whether, under these circumstances, the testator could call upon William Gilbert and compel him to pay the 1,000*l.* He had joined in representing to the creditors that there was property equal to pay 1*l.*s. in the pound; but that would

not be so if he had required payment of his 1,000*l.*, and he, therefore, promised to relinquish it. Could he afterwards disappoint the expectations he had raised, and falsify the promise he had made by compelling payment of the 1,000*l.*? It is true, that as he guaranteed the payment of the composition, the creditors, though disappointed of receiving their composition from the property of the debtor, might obtain it from the testator; but under the arrangement they had the double security, and it was for them to judge whether they would take the personal guarantee of the testator in lieu of the actual produce of the estate. I think it clear that the testator could not have withdrawn himself from the arrangement to which he had become a party, and have demanded payment of his 1,000*l.* before that arrangement had been carried into effect. And, consequently, that William Gilbert, the principal debtor, having had time given him by the obligee, that is to say, a new obligation entered into which protected him against payment of the debt, the surety was discharged. If the testator could have called upon John Gilbert to pay his proportion of the 1,000*l.*, he might have required repayment of it from William Gilbert, whereby the arrangement between William and the testator and the creditors would have been defeated. This is the principle upon which cases of this kind depend, and I think that the facts bring this case within it, and that the Master's finding that John Gilbert was not liable to pay any part of the 1,000*l.* was correct, which was all that John Gilbert had even under the irregular reference of the 30th of July 1847 to do with the matter. The plaintiff, however, in his exceptions to the Master's report, controverts all the findings both as to John Gilbert's liability and as to the liability of the principal debtor, which, in the view I have taken of this case, is immaterial, which creates some difficulty as to the form of the order to be drawn up to give effect to my decision. It should, however, I think, be to overrule the sixth exception upon the merits, and all the others as immaterial between the plaintiff and John Gilbert.

WIGRAM, V.C. }
March 23. } MURRAY v. PARKER.

*Partnership, Agreement to dissolve—
Specific Performance—Account—Annuity
—Statute of Limitations.*

By agreement, a partnership between two solicitors was to be dissolved, the accounts taken, and the continuing partner to pay an annuity quarterly, for three years, to the retiring partner. The latter died before the expiration of the third year, without having received any part of the annuity:—Held, on bill, filed within six years from his death, but after six years from the quarter day preceding it, that the annuity was part of the agreement; and that his representative was entitled to specific performance of the whole of the agreement, irrespective of the question whether he was or not barred by the Statute of Limitations from recovering the annuity in a court of equity.

This was a suit for a partnership account under an agreement to dissolve, and for payment of arrears of annuity agreed to be paid to the retiring partner.

By a draft agreement in writing, made in March 1840, and signed by the defendant Thomas Parker and John Swayne Sculthorpe (since deceased), it was agreed to dissolve their then partnership of solicitors and attornies; that all debts and accounts then due to the firm should be got in; that J. S. Sculthorpe should retire, and his share in the business be transferred to the defendant; and that in consideration of such dissolution, retirement and transfer, the defendant should, by bond, secure to J. S. Sculthorpe an annuity of 100*l.* a year from the 25th of March 1840, payable quarterly, for three years, if the latter should so long live. The bond was not executed. The partnership was dissolved, and the defendant entered into sole possession of the effects. The retiring partner died in February 1843, and the plaintiff took out letters of administration to his effects. The defendant had never paid any part of the annuity, either to the deceased or the plaintiff, and had not rendered any account otherwise than to the solicitors of the plaintiff. In reply to an application from them in June 1847, the defendant expressed his

willingness to render the accounts required, upon having a release from the plaintiff as administrator, but resisted payment of the annuity on the ground that it was barred by the Statute of Limitations (1). The bill, stating the above particulars, was filed in February 1849, and within six years from the day of J. S. Sculthorpe's decease.

The Solicitor General and Mr. Bates, for the plaintiff.—The annuity claimed was part of the agreement to dissolve the partnership, and the agreement being admitted by the defendant, the plaintiff is entitled to have it carried into effect *in toto*. At the time of filing the bill six years had not elapsed since the death of the annuitant, and therefore the claim for the arrears of the annuity was not barred by the statute.

They cited—

Lobb v. Stanley, 5 Q.B. Rep. 574; s. c. 13 Law J. Rep. (n.s.) Q.B. 117.

Sanders v. Coward, 15 Mee. & W. 48; s. c. 15 Law J. Rep. (n.s.) Exch. 97; 8 Dowl. & L. P.C. 281.

Townsend v. Deacon, 18 Law J. Rep. (n.s.) Exch. 298.

Mr. James Parker and Mr. Terrell for the defendant.—The agreement to pay the annuity contained no provision to pay it for any proportionate part of a quarter. The Apportionment Act (2) was not applicable to the interests of the grantor and grantee of an annuity, &c., but merely to the interests of successive grantees, &c. Consequently, the last payment of the annuity in the present case which could be claimed was that which accrued at the end of the quarter preceding the decease of Sculthorpe. At the time of filing the bill, six years had elapsed since the expiration of that quarter, and therefore the claim was barred by the statute.

The Solicitor General replied.

WIGRAM, V.C. thought that there was an agreement to dissolve the partnership, and that the annuity was part of such

(1) 3 & 4 Will. 4. c. 27.

(2) 4 & 5 Will. 4. c. 22.

agreement. The plaintiff was entitled to have the whole of the agreement specifically performed; and as the dissolution and the right to an account were founded upon the agreement, it was not necessary to decide whether the plaintiff could have come into equity to establish the annuity, irrespective of the accounts of the partnership. The decree, therefore, would be for specific performance and for the accounts on the footing of the agreement; any settled accounts not to be disturbed.

Decree accordingly.

K. BRUCE, V.C. }
 April 23; }
 May 6. } OGLE v. MORGAN.

Will — Construction — Legacy — Servant — Domestic Establishment.

The Earl of A. by his will gave to each person as servant in his domestic establishment at the time of his death a year's wages. The Earl of A. lived at E. Castle. Adjoining to the castle was a garden, inclosed by a wall, which was cultivated under the direction of O. as head gardener. O. lived in a garden-house situated in the garden, the domestic work of which was performed by the Earl's servants who came there from the castle:—Held, that O. was entitled to a legacy under the above clause.

In this case the garden-house had been pulled down shortly before the Earl's death, and a new house was in the course of erection at his death; and, during this period, O. lived at some distance from the castle. It was, however, the intention of the Earl that, on the completion of the new house, O. should remove to it:—Held, that O.'s absence was only of a temporary and provisional nature and did not interfere with his right to the legacy.

In this case the circumstance that O. was hired at weekly wages (the hiring not being a yearly one) did not interfere with his right to the legacy.

John Earl of Abergavenny, by his will, dated the 23rd of October 1843, directed his trustees and executors to pay certain legacies. The language of the will as to

these legacies was as follows:—"Namely, the legacy or sum of 500*l.* to my faithful valet, William Barford, and the like legacy or sum of 500*l.* to Elizabeth his wife, and, in the event of the death of either of them in my lifetime, the survivor to have both sums; to Mrs. Frieston, my cook, the legacy or sum of 500*l.*; to my butler, Thomas Cutting, the legacy or sum of 100*l.*; to William Cutting and George Lamb, both now in my service, the legacy or sum of 100*l.* each; and to each person as a servant in my domestic establishment at the time of my decease a year's wages beyond what shall be due to him or her for wages; and to James Reader, my late bailiff, the sum of 100*l.*; all which said legacies I hereby direct shall be paid and discharged within six months after my decease."

The Earl lived in Eridge Castle. Immediately adjoining and attached to the castle was a garden, inclosed by a wall, which was usually under the management of a head gardener. The place of head gardener being about to be vacant in the spring of 1844, the Earl's agent wrote a letter to the plaintiff, Mr. Ogle, dated in May 1844, which in part is as follows:—"The present gardener receives 25*s.* per week, finding himself everything; the wages stated to Ker were 70*l.* per year, with the same understanding of the Earl, of his finding himself everything as the present gardener does. I can, therefore, do no more at present than engage you upon the same terms as were offered to Ker, by saying, as the hiring is to be for a month's warning or a month's wages (the same as it has been) 27*s.* per week, equivalent to the 70*l.* per year, and 2*s.* over the present weekly wages, finding yourself everything, with a privilege of a certain quantity of milk daily; but with regard to furniture, as that is inconvenient to persons moving about, I will arrange to leave enough in the house for your present uses. No perquisites allowed of selling anything, or in any other way. If you are willing to accept the situation upon the terms mentioned, you had better sign this letter as consenting to the terms, and return it to me." The letter was signed by the plaintiff, with the addition of the words "the above terms agreed to"; and Mr.

Ogle soon after entered the service of the Earl as gardener.

Mr. Ogle resided in a garden-house situated in the middle of the garden, which had been furnished by the Earl, and all the expenses of which were defrayed by him. The domestic work of the house was performed by the female servants of the Earl, who went there from the castle, and a charwoman who was paid by the Earl. Some time after Mr. Ogle had been gardener the Earl determined to pull down the garden-house and build another in its place, and, in consequence of this, Mr. Ogle removed to a cottage belonging to the Earl situated at Eridge Green, all the expenses of which were paid by the Earl.

The Earl died in 1845. At this time Mr. Ogle was living at the cottage in Eridge Green. The old garden-house had been pulled down, and a new one was then in the course of erection. Mr. Ogle had continued to be gardener from the time of his entering the Earl's service until his death. His wages had during that time been paid to him weekly at the rate mentioned in the letter, and he had, in addition, allowances of milk and firewood.

Mr. Ogle claimed from the Earl's executors a year's wages as a legacy, which they having declined to pay him, a bill was filed by him to obtain payment of it.

The facts above stated were proved by the plaintiff, or admitted by the defendants.

The defendants proved that the Earl's will had been attested by the person who was then the head gardener, from which an inference might be drawn that he did not intend his gardener to be a legatee.

There were some matters as to which there was conflicting testimony. The plaintiff insisted that he had a right to dine at the castle; the defendants, however, insisted that, although he sometimes dined there, it was a matter of favour and not of right. The plaintiff maintained that the cottage at Eridge Green was furnished by the Earl, and that the attendance on the part of the servants of the castle and the charwoman was the same as that at the garden-house, which the defendants denied.

Mr. Swanston and Mr. Pitman, for the plaintiff, contended that the hiring of the plaintiff was a yearly, and not a weekly, hiring; that the enjoyment of a garden

was of a domestic character, and that the servants ministering to that enjoyment must, therefore, be considered as "domestic servants"; that the residence of the plaintiff at the garden-house was the same as if he had lived in the castle, and that the question was not affected by the residence at Eridge Green, which was only of a temporary nature. They cited and referred to *Townshend v. Windham* (1), *Chilcot v. Bromley* (2), *Booth v. Dean* (3), and *Bulling v. Ellice* (4). *Co. Lit.* 56, b, was also referred to, where it was laid down that the word "house" comprehended "the buildings, curtilage, orchard and garden."

Mr. Russell and Mr. Torriano contended that the plaintiff was not entitled to the legacy on the grounds that the enjoyment of a garden was not of a domestic character, and that the gardener was, therefore, not in the domestic establishment, and was, in fact, no more a domestic servant than a gamekeeper or a forester; that, however this might be, from the residence in the garden-house, he was not in the domestic establishment, and still less from his residence at the cottage at Eridge Green. They also remarked on the attestation of the will by the person who was then the gardener. They cited *Booth v. Dean* and *Jones v. Henley* (5).

Mr. Swanston replied.

Knight Bruce, V.C.—In this case the question for decision is whether the plaintiff, who had been the late Earl of Abergavenny's head gardener at the time of his death, and therefore his servant in that capacity, is entitled to claim as a legatee under the gift or clause contained in the Earl's will in these words:—"I give to each person as a servant in my domestic establishment at the time of my decease a year's wages beyond what shall be due to him or her." It has been contended that this clause or gift did not apply to any person not mentioned in the preceding part of the will, and that, as the plaintiff was not so mentioned, he was not a legatee;

(1) 2 Vern. 546.

(2) 12 Ves. 114.

(3) 1 Myl. & K. 560; a.c. 2 Law J. Rep. (n.s.) Chanc. 162.

(4) 9 Jur. 936.

(5) 2 Ch. Rep. 361.

even if he was at the time of the testator's death a servant of the Earl in his domestic establishment at yearly wages. I do not, however, feel myself at liberty to adopt this interpretation. The nature of the plaintiff's contract in respect of wages, so far as they were pecuniary (which mainly, if not solely they were) must, I think, be taken, upon the evidence, to have been weekly wages. The contract of hiring, however, required a month's notice on either side, or on one side a month's wages, for terminating the connexion. It appears to me that, if the plaintiff was at the testator's death a servant of the testator in his domestic establishment, he is, under the clause or gift, benefited to the extent or amount of fifty-two weeks' pecuniary wages, and, considering the Earl's situation in society, his manner and habits of life, so far as they appear, the nature of the plaintiff's duties, and the other facts in evidence, I am of opinion that, had the plaintiff at the time of Lord Abergavenny's death been boarded and lodged, or merely lodged in the mansion-house of Eridge Castle, all the circumstances of the case not inconsistent with that supposition being assumed to have been as they were, the plaintiff would have been entitled to the legacy which he claims. But further, if the garden-house had not been taken down, and the plaintiff had not removed himself or been removed to Eridge Green, and had continued until his master's death in such occupation or partial occupation of the garden-house as he for some time had, I should have thought the plaintiff entitled to the legacy. The question then is, whether the circumstances of taking down the garden-house and the removal to Eridge Green, or either, make any material difference.—[His Honour then read the evidence as to the occupation by the plaintiff of the garden-house, and the attendance there of the Earl's servants and the removal to Eridge Green].—Now, seeing that the evidence which has been given in the cause contains these statements, which ought to be taken to be true, I think that the plaintiff's residence at Eridge Green was of a temporary, transitory, and provisional nature, and that his return to the lodge in the garden at Eridge Castle was intended when a new garden-house should have been built. That

building was not completed at the time of the Earl's death, although it was commenced previously. So viewing the case, I am of opinion that the plaintiff's claim was not prejudiced or affected by the pulling down of the old garden-house, or by his removal to Eridge Green, or his residence there when the testator died. The plaintiff is entitled to the legacy which he has claimed as much as if he had, during his whole service, lodged in the garden-house, or in the castle, and he ought, therefore, to have a decree.

L.C. }
Feb. 11. } PADBURY v. CLARKE.

Election—Devisee—Heir-at-Law.

A testator being entitled to an undivided moiety in two freehold houses U. and N. (the other undivided moieties belonging to M. B, his niece and heiress-at-law, subject to the interest of her father, as tenant by the curtesy) and also to a leasehold house, devised to S. P. "all my freehold house U," and bequeathed to M. B. "all my moiety of and in a leasehold house at," &c., and directed that the rents should accumulate during the minority of M. B. and be paid to her at her full age. The testator died in 1812. The father of M. B. received the rents of the leasehold house until the expiration of the lease in 1819, and on M. B. coming of age in 1831, he accounted with her for these rents, and paid over to her a balance of 49l. in respect thereof. In 1832 M. B. made a mortgage in fee of her moiety of U, and the entirety of B, and on her marriage in 1833 settled the same to the use of herself and intended husband and the issue of the marriage. Afterwards S. P, the trustees of the settlement, and the father of M. B, joined in granting a lease for years of the freehold house U. In 1847 S. P. filed his bill:—Held, upon appeal, that the testator, by his devise of "all my freehold house," intended to pass the entirety, and that M. B. was bound to elect whether she would take under the will or as heiress-at-law; but that the receipt of the rents of the leasehold house by her father, and her acceptance of the balance 49l., did not, under the circumstances, amount to a declaration of election, and that M. B.

electing at the hearing to take against the will, must account to the plaintiff for the rents of the leasehold house.

James Salkhill, by his will, dated the 11th of August 1796, gave to his wife, Mary Salkhill, two freehold houses at Tottenham High Cross, for life, and after her decease he devised the houses, with their appurtenances, to her nephew, John Cox the elder, upon trust as to one moiety, and the profits thereof, for the use of his son, John Cox the younger, for his education and bringing up, until he attained the age of twenty-one years; and then to convey and assign the said undivided moiety for his own use, and after his decease to his heirs and assigns for ever; and as to the other undivided moiety and the profits thereof, in trust for the use and benefit of Mary Cox, daughter of the said John Cox the elder, for her benefit and bringing up until she attained the age of twenty-one years, and after her death to her heirs and assigns absolutely for ever; and if the said John Cox the younger should die before he attained the age of twenty-one, and without issue, then John Cox the elder was to stand possessed of both houses, for the use and benefit of Mary Cox, until she attained the age of twenty-one years; and after her attaining that age, to assign the said two houses to her, her heirs and assigns; and if she should die before she attained the age of twenty-one years without issue, the said John Cox the elder was to stand possessed of the said two houses for the said John Cox the younger, and to convey to him the same after he attained the age of twenty-one years, for ever; and if both the said John Cox the younger and Mary Cox should die before they attained the age of twenty-one years without issue, then for the said John Cox the elder, his heirs and assigns. The testator died in 1796, and his wife, who survived him, died in 1799.

Mary Cox afterwards attained twenty-one, and in 1809 she intermarried with the defendant Henry Brown, and died shortly afterwards, leaving one daughter, Mary Cox Brown, her only child and heiress-at-law, whereupon Henry Brown became tenant by the curtesy to an undivided moiety of the two houses.

In 1800 John Cox the elder died intestate as to the two houses devised to him, leaving John Cox his only son and heir, who attained the age of twenty-one years.

The bill then alleged that John Cox the younger and Mary Brown entered into possession of the two houses upon the decease of Mary Salkhill, and that John Cox the younger, as heir-at-law of James Salkhill, and of his father, erroneously considered himself entitled to make choice of the two houses, and to take the entirety of either of them as his own; and that he accordingly determined to take the house which he subsequently devised by his will, and which he described as being in the occupation of Thomas Upton. That the rent had for some time been received by W. Crook, as the agent of both, and had been handed over to John Cox the younger and Henry Brown, in equal moieties; that Henry Brown had subsequently received them, and accounted to John Cox the younger for one moiety and retained the other moiety for his own use. That John Cox the younger, at the time of his death, was seised of the legal fee of the entirety of the two houses, and was beneficially entitled in fee to one undivided moiety of the same, and was also possessed of a moiety of a house in Park Street, for the remainder of a long term of years, which did not expire until some years after the death of John Cox the younger.

John Cox the younger, by his will, dated the 20th of March 1812, gave and devised unto his aunt, Catherine Padbury (the plaintiff's mother) all that his freehold messuage or tenement, with the garden and all and singular the appurtenances thereto belonging, situate at Tottenham High Cross, then on lease to Thomas Upton and in his occupation; to hold the same unto his aunt, Catherine Padbury, and her assigns, for her sole and separate use, notwithstanding her coverture, during the term of her natural life, and after her decease he gave and devised the said messuage, &c. unto the plaintiff, Samuel Padbury, his heirs and assigns for ever; and the testator also gave unto William Crook all that his moiety of and in the leasehold messuage, &c. in Park Street, and then in the occupation of Mr. Mangles, upon the trusts, until the determination of his estate

and interest therein, to receive his proportion of the rents and profits thereof, and invest the same as it should become due and payable in the purchase of 5*l.* per cent. bank annuities, in the name of his niece Mary Cox Brown, daughter of his late sister the wife of Henry Brown, and he directed that the produce thereof, together with the interest thereon, should remain invested, and be received by his said niece M. C. Brown, on her attaining the age of twenty-one years or day of marriage.

John Cox the younger died in 1812, without having revoked his will, leaving the defendant, Mary Cox Clarke, then Mary Cox Brown, his heiress-at-law, surviving, and also heiress-at-law of James Salkhill.

It was alleged that William Crook assented to the bequest of the moiety of the leasehold house.

The bill then alleged that Mary Cox Clarke, on the death of John Cox the younger, or at any rate on attaining twenty-one, was bound to elect whether she would take under the will of John Cox the younger, without interposing her claim as heiress of Mary Brown in frustration of the devise, or whether she would take as heiress, and give up the leasehold house in Park Street, bequeathed to her by the same will. That Henry Brown, during the minority of M. Clarke, as her father and guardian, elected to take under the will, and that the plaintiff lately discovered that this was confirmed by her on her attaining twenty-one, and that her father accounted with her for the rents and profits of the moiety of the leasehold house in Park Street, which exceeded in value the moiety of the freehold house formerly in the occupation of Thomas Upton. That Henry Brown from the death of his wife received one moiety of the rents of the freehold house, as tenant by the curtesy, and from the death of John Cox the younger, Catherine Padbury, and after her death the plaintiff, received the rents of the other moiety of the house formerly in the occupation of Thomas Upton.

Catherine Padbury died in 1830.

Mary Cox Clarke attained the age of twenty-one on the 16th of December 1831, and the bill charged that she was a trustee for the plaintiff and his heirs of the entirety of the house, formerly in the occupation

of Thomas Upton, subject to the interest of Henry Brown, in a moiety thereof, as tenant by the curtesy, and that she ought to have conveyed one moiety to the plaintiff and his heirs, and the other moiety to Henry Brown for life, as tenant by the curtesy, and after his death to the use of the plaintiff, his heirs and assigns.

By indenture bearing date the 21st and 22nd of November 1832, Mary Cox Clarke conveyed and assigned the legal estate in fee simple not only in the house occupied by Mr. North, but in her one moiety of the house occupied by Thomas Upton, to Samuel Layden and W. B. Ramsden by way of mortgage, to secure the repayment of the sum of 160*l.*, with interest at 5*l.* per cent., and on the 18th and 19th of July 1837, by deeds indorsed upon the mortgage, Robert Pearce and William Crosby M'Nae took a transfer of the mortgage from Samuel Layden and W. B. Ramsden.

By indenture, bearing date the 4th and 5th of June 1833, being a settlement made in contemplation of a marriage between William Clarke and Mary Cox his wife, they joined in conveying the house occupied by North and the moiety of the house occupied by Upton to James Brown, since deceased, and Percival Turner, for the benefit of themselves for life, with remainder for the benefit of the children of the marriage, of whom there were seven, who, together with the surviving trustees of the settlement, were made defendants to the bill.

The bill then charged that the mortgagees, and also the trustees of the settlement, had full notice of all the documents and of all the facts stated in the bill.

On the 28th of August 1833 the plaintiff and the trustees of the settlement made upon the marriage of William Clarke and his wife, together with Henry Brown, joined in granting a lease of the entirety of the house formerly in the occupation of Thomas Upton to Mr. Gasson, for thirty years from Lady-day 1833, at a rent of 20*l.*, which was made payable in general terms to the whole of the lessees.

The bill then prayed that the trusts of the will of William Salkhill remaining unperformed might be carried into effect, and that Robert Pearce, William Clarke and

Mary Cox his wife, might convey the freehold house and garden formerly in the occupation of Thomas Upton to the use of the persons who now had become entitled thereto; and that it might be declared that Mary Cox Clarke upon attaining twenty-one, besides conveying to the plaintiff the fee simple in one undivided moiety of the last-mentioned freehold house and garden, became and was bound to elect whether as the heiress-at-law of Mary Brown, she would take against the will of John Cox the younger, and hold the other moiety of the said last-mentioned freehold house and garden, and assign and hand over to the plaintiff the said moiety of the said leasehold house in Park Street, and the rents and profits derived therefrom since the death of the said John Cox the younger, or a competent part thereof, or whether she would take under the will of John Cox the younger, and retain the moiety of the leasehold house and the rents and profits derived therefrom, and convey the last-mentioned moiety of the freehold house and garden formerly in the occupation of Thomas Upton to the use of the plaintiff and his heirs, subject to the life interest of the said Henry Brown as such tenant by the curtesy; and that it might be declared that the defendant, Mary Cox Clarke, had elected to take, and had taken, under the will of John Cox the younger, and that, accordingly, she might be ordered to convey to the plaintiff in fee simple one moiety of the said last-mentioned freehold house and garden, and that the said Robert Pearce, William Clarke and Mary Cox his wife, and all proper and necessary parties might be decreed to convey the other moiety of the said freehold house and garden to the use of Henry Brown for his life as tenant by the curtesy, with remainder to the plaintiff in fee. And in case the Court should be of opinion that the defendant, Mary Cox Clarke, had not irrevocably elected to take under the will of John Cox the younger, that it might be declared that the said last-named defendant and those claiming under her were bound to elect.

From the evidence in the cause it appeared, that the lease of the house in Park Street expired in 1819, and that it was subject to a very heavy ground rent; and

that the rent arising from the house was applied during her infancy, partly in her maintenance; and that a surplus of about 40*l.* was laid out in the purchase of long annuities; that upon Mary Cox Clarke attaining twenty-one an account was rendered to her by Henry Brown of the rents, and she received the money arising from the sale of the long annuities.

Upon the cause coming on before the Vice Chancellor of England, he declared that upon attaining the age of twenty-one years, Mary Cox Clarke was bound to elect; and that Mary Cox Clarke after attaining twenty-one, and before making the mortgage to Layden and Ramsden, had duly elected to take under the will of John Cox the younger; and that she became and was bound not only to convey to the plaintiff in fee simple the undivided moiety of the freehold house, &c., to which John Cox the younger was beneficially entitled, but also became and was bound to convey to the plaintiff in fee simple the other undivided moiety of the said house, &c., but as to such last-mentioned moiety, subject to the life interest of Henry Brown as tenant by the curtesy; and it was ordered, that the defendants, William Clarke and Mary Cox his wife, Robert Pearce and William Crosby McNae and Percival Turner should convey and join in conveying the entirety of the house to the plaintiff, free from the mortgage debt and all incumbrances. It was also ordered, that the same five defendants should deliver up to the plaintiff upon oath all deeds and documents in their respective possession relating to the title to the said freehold house or such of them as did not relate to premises of greater value. It was also ordered that the plaintiff should pay the costs of Henry Brown against whom the replication had been withdrawn, and who had been examined as a witness; and it was ordered that the defendants, William Clarke, Robert Pearce, and William Crosby McNae and Percival Turner should pay the plaintiff his costs of the suit.

Against this decree all the defendants, except Henry Brown, appealed.

Mr. Malins and *Mr. Shebbeare*, in support of the appeal.—Three questions arise in this case: first, whether this is a case for election; secondly, whether any elec-

tion has been made, and thirdly, whether from the length of time the suit ought to be maintained.

To raise a case of election, it should be clear that the testator intended to dispose of what did not belong to him. Now, in this case John Cox the younger by his will gave to Charles Padbury "all that *my* freehold house on lease to Thomas Upton"; this would clearly pass the moiety to which he was beneficially entitled; and, if the words are satisfied by that construction, the Court will not extend the words so as to include that which did not belong to the testator where the effect of that would be to disinherit the heir. But assuming there was a case for election, the party had a right of choice, and it must be a deliberate act—*Dillon v. Parker* (1), *Edwards v. Morgan* (2), and the party had a right to know the precise and relative value of the property before he could be put to his election. It was said that there had been an election; but in *Reynard v. Spence* (3), the holding property for five years had been held not to amount to an election; that part of the decree, therefore, which declares that Mary Cox Clarke had elected is without precedent. It was said there was an intention to dispose of the entirety, but if a party, having a power, disposes of property, and the language of the instrument can be satisfied by reference to any property or any interest whatever not the subject of the power, it shall be held to apply to that property or that interest, and not to the subject of the power—*Denne d. Nowell v. Roake* (4); and in this case sufficient had passed to answer the words "all my freehold messuage," without including the undivided moiety belonging to Mr. Clarke. But the plaintiff ever since the death of the testator had acquiesced in the division of the property, and against this no notice could affect the purchaser for value—*Shuttleworth v. Greaves* (5). The defendants are entitled, at all events, to so much of the

costs of this suit as asked for the conveyance of the one moiety, as no application had ever been made to Mrs. Clarke to convey it.

Dummer v. Pitcher, 2 Myl. & K. 274.

Butricke v. Broadhurst, 1 Ves. jun. 171.

Wake v. Wake, 1 Ves. jun. 335.

Mr. T. Parker, Jun. appeared for Messrs. Pearce and McNae.

Mr. Bethell and *Mr. Kinglake*, in support of the decree.—The word "*my*" is sufficiently indicative of the testator's intention to pass the entirety of the property. The plaintiff's claim to put Mrs. Clarke to her election would not arise until the death of H. Brown, who was tenant for life of the moiety—*Duke of Leeds v. Earl Amherst* (6). The parties had notice of the plaintiff's equitable title, for it was inherent in the deeds under which they took. In the lease of 1833, the rent was reserved generally in accordance with the rights of the parties in the property. The party who was bound to elect had consumed the property, and could not now put the other party in the same condition. She had thereby determined her election, and could not now claim the right of a new choice—*Rumbold v. Rumbold* (7).

Mr. Glasse appeared for the defendant, Henry Brown.

Mr. Malins, in reply, cited *Bennet v. Davis* (8).

The LORD CHANCELLOR afterwards delivered the following judgment.—Two questions are raised by this appeal, first, whether the case be one of election, and whether a binding election has taken place. The first question depends upon the devise in the will of John Cox the younger, of the house and premises at Tottenham. He was entitled to one moiety only, and his niece, Mary Cox Brown, to the other moiety. The gift is in favour of the plaintiff; and the question is, was it intended to apply to this moiety only, or did he intend to give the whole of the house and premises to the plaintiff? If he

(1) 1 Swanst. 359.

(2) M'Cle. 541.

(3) 4 Beav. 103.

(4) 5 B. & C. 721; s. c. 5 Dowl. & Ry. 514; 4 Law J. Rep. K.B. 271.

(5) 4 Myl. & Cr. 35; s. c. 8 Law J. Rep. (N.S.) Chanc. 7.

(6) 13 Sim. 459; s. c. 14 Law J. Rep. (N.S.) Chanc. 73.

(7) 3 Ves. 65.

(8) 2 P. Wms. 316.

intended by the words used to include and give the whole, it is immaterial from what cause that intention proceeded, whether he forgot or misunderstood his rights and assumed that he was entitled to take the whole of that house to himself, leaving the other, of which he was also entitled to one moiety, to his niece who was entitled to the other moiety of it. Looking then to the words used for the purpose of ascertaining what the testator intended to give, I do not find any ground for a doubt as to his intention to give the entirety. The words are ample, complete and correct for the purpose, but wholly inapplicable to the supposed gift of a moiety only; and if this were matter of any doubt, the terms used in the gift of the moiety of the house in Park Street, in which he did intend to give a moiety only, would strongly corroborate this construction, shewing the manner in which he describes a moiety of premises, when his intention was only to give a moiety. Upon the first question, therefore, I think the declaration and decree of the Vice Chancellor clearly right, and that the will did raise a case of election against Mary Cox Brown, the owner of one moiety of this property, so that she could not withhold her moiety from the plaintiff, who the testator intended should have it under his will without giving up to him all benefit which she took under the will, being in fact only the testator's moiety of the house in Park Street. The decree, after declaring that the defendant, Mary Cox Clarke formerly Brown, was, upon attaining the age of twenty-one, bound to elect, declared that after attaining that age and before the making of the mortgage to the defendants, Layden and Ramsden, she had duly elected to take under the will, and thereby became bound to convey the moiety of the testator in the premises at Tottenham to the plaintiff, subject to the estate of her father as tenant by the curtesy.

In order to try the accuracy of this declaration the facts and circumstances which followed the death of the testator must be very carefully investigated. The testator died according to the statement of the bill in 1812. At that time his niece, Mary Cox Brown afterwards Clarke, was under twenty-one, which age she attained in December 1831,

and in 1833 she married the defendant Clarke. The act relied upon by the bill, and that I presume upon which the decree declares that the testator's niece, Mary Cox Brown afterwards Clarke, had elected, is, that upon her attaining twenty-one, and before her marriage, her father, who had received the rents for her of the leasehold house in Park Street during her minority, paid her a sum of about 49*l.* as the balance of his receipts, being the proceeds of the moiety of the rents of the leasehold house up to the year 1819, when the lease expired; the whole of the other portion of the rent so received by him on account of his daughter having as he states (he being examined as a witness) been expended by him in her maintenance during her minority. The result therefore is that the appellant, Mary Cox Clarke formerly Brown, never was in possession or in the receipt of the rents or profits of the moiety of the house in Park Street at any time, the lease having expired long before she attained twenty-one, but that her father having received such rents during her minority, when she attained twenty-one paid over to her and she accepted a small sum as the balance of such rents, the lease itself having long before expired. There cannot be a stronger case in favour of the alleged election than would have been the case if the lease had been still subsisting when she attained twenty-one, and she had herself received 49*l.* on account of the moiety of such rents; but then it becomes necessary to inquire into the history of the property as against which this election is supposed to have been made; for if a party being bound to elect between two properties, not being called upon so to elect, continues in the receipt of the rents and profits of both, such receipt affording no proof of preference cannot be an election to take the one and reject the other. And so if the other property be under circumstances that does not yield rent to be received by the party liable to elect, but such party, particularly if with the knowledge and concurrence of the party entitled to call for such election, deal with such other property as her own, it would seem that such acts ought to be equally unavailable to prove an actual election; for in

both cases there is, as far as circumstances will admit, an equal dealing with the two properties, and therefore an absence of proof of any intention to elect the one and reject the other. Henry Brown being tenant by the curtesy of the half of the house at Tottenham, no rent from it could be received by Mary Cox Brown afterwards Clarke; but it is an admitted fact, and is indeed part of the statement in the bill, that the appellant Mary Cox Brown afterwards Clarke, after she attained twenty-one, and before her marriage, mortgaged the moiety of the freehold house, which mortgage is now vested in the defendant and appellant, the transferees of the mortgage: that upon her marriage in 1833 she settled her moiety upon certain trusts for the benefit of herself, her intended husband, and the issue of the marriage, and that in August 1833 the plaintiff, being in his own right entitled to one moiety, joined with Henry Brown, entitled as tenant by the curtesy to a life estate in the other moiety, and the trustees of the settlement of the appellants, William Clarke and Mary Cox his wife, in a lease of the entirety of the house and premises to Gasson for thirty years; proving that the election in 1831 or at any other time was not considered by any of the parties, including the plaintiff himself, as having taken place, and shewing a treating with the property against which the election is supposed to have been made, neutralizing at least the receipt of the balance of rent from the property supposed to have been elected. The defendants insisted that whatever the plaintiff's right may have been to call upon Mary Cox Clarke to elect, it has been lost by the lapse of time. This is answered by the dates. She did not attain twenty-one until 1831, and the bill was filed in 1847. Then and now the interest in the moiety of the premises at Tottenham was reversionary; Henry Brown, the tenant by the curtesy, being still alive. The interest in the house in Park Street terminated in 1819 by the expiration of the lease. The defendant, as I understand, at the hearing being now called upon to elect, chooses to take the moiety of the premises at Tottenham, and must therefore account to the plaintiff for the rents received on her account for the moiety of the

house at Park Street from the testator's death in 1812, to the expiration of the lease in 1819. She did not indeed receive these rents herself, but they were either received by the trustee, Crook, or by her father for her use, and she, electing to take against the will, is bound to make good to the disappointed party the value of the property intended for her.

The costs of the suit must remain to be considered. In my view of the case, the plaintiff has failed in contending that the defendant Mary Cox Clarke had elected to take the half of the house in Park Street, and upon that ground the plaintiff claiming the half of the premises at Tottenham, it became necessary to make a case of notice against the parties claiming under the mortgage, and under the marriage settlement, all which has become useless expense. I am, therefore, of opinion that the bill must be dismissed, with costs as against such parties; and as against Mary Cox Clarke and her husband, so much must be dismissed, with costs, as prays that it may be declared that an election had been made.

LORDS COM. }
June 25. }

JONES v. LEWIS.

Company—Costs—Compulsory taking of Land—Successive Re-investments of Purchase-money.

*Under the 6 & 7 Will. 4. c. 79. the Trinity House purchased the Skerries Lighthouse, and the petitioner, an infant, was interested in one-third of the purchase-money, namely 141,660*l.* The 28th clause of the act empowered the Court to order the costs of re-investing the purchase-money in land to be paid by the corporation. Upon appeal, the costs of a fourth purchase were ordered to be paid by the corporation, the proceedings not being vexatious.*

In 1837 the Skerries Lighthouse was purchased by the corporation of the Trinity House for the sum of 484,984*l.* 11*s.*; and the plaintiff, Morgan Jones, an infant, was interested in one-third of the purchase-money, namely, 141,661*l.* 10*s.* An inter-

mediate investment of the last-mentioned sum had been made in the 3l. per cent. consols; and a part of it had afterwards been invested in two separate purchases of land for 96,000l. and 12,000l. respectively, the expenses of which purchases had been ordered to be paid by the Trinity House. On the 22nd of June 1839, a third purchase was effected for 5,000l.; and after deducting this sum the stock remaining in court amounted to 28,923l. 10s. 1d. The costs of this purchase Knight Bruce, V.C. refused to allow as against the Trinity House. A fourth purchase had since been effected of land adjoining that already purchased, at the sum of 15,000l. The Master having approved of the title, a petition was presented praying the confirmation of the Master's report, and that the Trinity House might pay the costs of the purchase. The 28th section of the 6 & 7 Will. 4. c. 79, being the act under which the Skerries Lighthouse was taken by the Trinity House, was as follows—“That where, by reason of any disability or incapacity of the person entitled to any such lighthouse, the purchase-money shall be required to be paid into the Bank of England and be subject to the orders and directions of the Court of Exchequer, under the provisions herein contained, the said Court may order all the reasonable costs, charges and expenses attending such purchase or which may be incurred in consequence thereof, and also of the investment of the purchase-money in real or government securities, and likewise the re-investment of such purchase-money, or the government and real securities purchased therewith, in the purchase of houses, buildings, lands, tenements and hereditaments as hereinbefore mentioned, together with the costs, charges and expenses of obtaining the proper orders and of the other proceedings for such purposes, and of the payment of the dividends and interest of the said government or real securities, and of the payment of the principal of the said purchase-money and of the government or real securities purchased therewith, out of court, to be paid by the said master, wardens and assistants, and the said master, wardens and assistants shall from time to time pay such sums of money for such purposes as the said Court shall

direct out of the monies applicable to the purposes of this act.”

The petitioner appealed against that part of the order refusing the costs.

Mr. Bacon and Mr. Pitman, for the appellant, cited *In re the Merchant Tailors Company* (1).

Mr. L. Wigram, for the Trinity House, contended that the allowance of these costs was discretionary in the Court; and that, the discretion having been exercised by the Court below, it was not the course of the Court to allow an appeal in such a matter: and he stated that 5,000l. had been already paid by the corporation in respect of costs in this same case; and that so many successive purchases were oppressive and unreasonable as against the corporation.

LORD COMMISSIONER LANGDALE.—There can be no doubt the petitioner is entitled to such costs as are reasonably and properly incurred. These acts of parliament are no doubt subject to a great deal of consideration, and the present act contains clauses very like those that have been inserted in many other acts upon which questions of this kind have very frequently arisen. I believe that the Court has in almost if not in every case, considered that it is to have regard to the imperial powers which are mentioned, and which are exercised by taking from a man the property which he had, and which he was unwilling to part with; taking it from him by imperial power and converting it into money, and, in cases where there were limitations of property, directing that the money which was produced should be re-invested. That is a case of this sort. I do not find that there is any distinction to be drawn between one species of landed property and another species of landed property. In this case he has that which is a perfect and good security, satisfactory to the owner of the property, taken from him by superior power, converted into money, and which is to be re-converted from money into land again; and in consequence of that state of things there is a direction given, that the reasonable expenses which are to be incurred in the change shall be paid to him.

(1) 10 Beav. 485.

Now, it is not to be denied but that a proceeding of that kind may be taken advantage of in such a way as to occasion vexatious and unnecessary expense to the party on whom the burthen is thrown; and in such a case as that I have never had the least doubt that, if it were made out, the Court would take care that the party attempting such a scheme should not be able to receive the profit of it, and would direct a restriction to be put upon the right which he has under the act of parliament; a right to be exercised and put in force by this Court. Therefore, I say, make out a case of vexation,—make out a case in which the party has improperly used the power which the act of parliament gave him for the purpose of throwing expenses unnecessarily on the other party, and he shall be charged. What is the nature of the case? Here is not less than 141,000*l.*, which is the money obtained as a compensation for the real property, a lighthouse,—but no matter what it is, 141,000*l.* is the money which is produced to the party for that which was his own, and which he would not have parted with unless he had been compelled to part with it. That may be assumed. Well, then, the 141,000*l.* being paid into the Court of Exchequer (now brought into the Court of Chancery), because of the incapacity of the person to whom it belonged to deal with it, the act of parliament provides that the Court may order all the reasonable costs, charges and expenses attending such purchase, &c.—[His Lordship here read the 28th clause of the act].—They are to be “reasonable costs.” The reasonable costs would, no doubt, be properly taxed and ascertained.

The question really raised here is, are the costs to be called unreasonable, because in re-investing no less a sum than 141,000*l.* there have been these particular sums of money invested separately? The first was 96,000*l.*; the second, 12,000*l.*; the third was 5,000*l.*; and the fourth was 15,500*l.* It does not exhaust by any means the whole sum. I cannot find there is anything said to shew that this was done for any improper purpose, unreasonably to throw the costs on the Trinity House, unreasonably to make several purchases in order that the Trinity House might have to pay the expenses of those investments. That

is not alleged; but it is alleged “you ought to have done all this in two, and if you are entitled to have your reasonable costs, charges and expenses, you ought to have made the whole investment of the 141,000*l.* two transactions, and no more.” I confess I cannot see that that is or ought to be considered as a general rule to be acted on. I cannot think because this is a lighthouse, a particular species of property, that a man is to be reduced to that necessity and is to be told “either you are to invest this in two transactions, or you are not to have the costs, charges and expenses which the act of parliament gives you.” A man might spend his whole life before he could find proper purchases suitable to his convenience. Make out that he is seeking for purchases for his own decoration or amusement, and had found them in little bits at a small rate each one, and that he is attempting to throw the expense of doing that on the Trinity House unnecessarily—make out such a case, and I think there ought to be interference against him. No such case has been made out, and therefore I think these costs ought to be allowed.

LORD COMMISSIONER ROLFE.—I think this case falls within the principle laid down by Lord Langdale in the case cited, from 10 *Beavan*, by Mr. Bacon. It is true, as it is stated, that in that act of parliament the direction was that *all* costs were to be paid, and that it is not so here; it is here “all reasonable costs,” but I think that that is a distinction without a difference, because “all costs” would, in the language of the legislature, imply all reasonable costs. It would be absurd to suppose they intended that unreasonable costs were to be paid, because they have not inserted the word “reasonable.” Then, Mr. Wigram contended, that this is a case within the discretion of the Judge, and not properly the subject of appeal, just in the same manner as the Court will not hear an appeal when there has been a decree giving costs, or the case of a bill taxed, and when, if it has been taxed on a correct principle, the Court would not look into the items. I do not think his analogy bears him out. If the act of parliament had said, the costs of so many

purchases shall be paid as the Judge shall think reasonable; and he had said, "I think five are reasonable, or six are reasonable," it might be that the Court would say, the Judge thinking that, we cannot be discussing whether seven or eight will be reasonable, when the Judge below has said, six or seven would be reasonable. That is not at all this case. I think the learned Vice Chancellor has proceeded on an erroneous principle. I can see no limit, I confess, except an unreasonable exercise of discretion on the part of those who are purchasing, but it is not suggested that there is anything of that sort here; on the contrary, his Honour is reported to have said, he supposed the parties acted *bond fide* in order to do their duty to the parties. If that is so, and, as Lord Langdale remarks, the imperial power has taken from the individual something which he had before, and has substituted a sum of money to be re-invested, I think these parties must pay all the costs of so reasonably re-investing, otherwise they do not put the party in the same position that he was in before the property was taken.

LORD COMMISSIONER LANGDALE.—No doubt, suspicions have been entertained in some cases, that an advantage was improperly taken of this clause; and, in consequence, a clause has been introduced into the recent acts of parliament, limiting the number of purchases. The mere existence of that clause shews we could not get on without it.

LORDS COM. }
July 10, 11, 15. } INDERWICK v. SNELL.

Jurisdiction—Resolution of a Joint-Stock Company—Removal of a Director—Reasonable Cause.

The deed of settlement of a joint-stock company provided, that an extraordinary general meeting, specially called for the purpose, might remove from his office any director for negligence, misconduct in office, or any other reasonable cause. A meeting was duly convened for the purpose, among other things, of removing I, C, and J. from the office of directors for negligence, misconduct in office, and other reasonable cause. I. and C. attended the meeting, but merely to

protest against its legality, and then retired; when the meeting unanimously removed I, C, and J. from the office of directors. On bill by I. and C, on behalf of themselves and other the proprietors, except the defendants,—Held, that the "reasonable cause" was such cause as in the opinion of the shareholders duly assembled should be considered reasonable; and that, in the absence of proof of fraud, it was not competent to the Court to review the resolution of the meeting on the ground that unfounded statements were made, and the charges were not substantiated in such manner and by such evidence as a court of justice would require.

This was a motion to discharge an order for an injunction granted by Wigram, V.C., and the principal question raised upon the motion was, whether the plaintiffs, Inderwick and Cowan, and the defendant Johnson, had been duly removed from the office of being directors of the London Conveyance Company. The company was established by a deed of settlement, dated the 1st of June 1836, and was formed for the purpose of running omnibuses from Paddington to the Bank and elsewhere, and the capital was to consist of 50,000*l.* in 5,000 shares of 10*l.* each. The clauses of the deed of settlement relating to the question were as follows:—"8. That an extraordinary general meeting may be called at any time by the board of directors in manner hereinafter mentioned. 9. That any ten or more of the proprietors holding in the aggregate not less than 1,000 shares, &c. may at any time, by writing under their hands, require the board of directors to call an extraordinary general meeting for any purpose relating to the company. 10. That every such requisition to the board of directors for calling any extraordinary general meeting shall be left at the office of the company at least fourteen days before the time named in the requisition for holding the same; and in every such requisition the object for which the extraordinary general meeting is required to be called must be fully expressed, and the day, hour, and place for holding the same must be specified, otherwise it shall not be incumbent on the board of directors to take notice of such requisition. 11. That if after any such requisition to

the board of directors for calling an extraordinary general meeting shall have been left at the office of the company, the board of directors shall neglect or refuse to call the same within the time and in the manner hereinafter mentioned, then and in such case it shall be lawful for the proprietors who shall have signed the neglected or refused requisition, to call the extraordinary general meeting on some other day for the purposes mentioned in such requisition, either by advertising the same in any two or more of the London daily newspapers, with their names subjoined, or by sending to each proprietor a circular letter, to be inserted or sent at least seven days and not more than fourteen days before the time fixed for holding such extraordinary general meeting, and to specify the day and hour of the meeting, and the place at which it is to be held; but it shall not be incumbent therein to specify the object of such meeting, unless it shall be called for dissolving the company. 25. That the general meetings shall have full power to superintend, regulate, and controul all the affairs of the company, except when otherwise provided by these presents. 27. That an extraordinary general meeting, specially called for the purpose, may remove from his office any director or auditor for negligence, misconduct in office, or any other reasonable cause. 29. That the half-yearly general meetings and extraordinary general meetings shall have power to call for, inspect and examine these presents, and all or any of the deeds or instruments whereby the same shall be agreed to be observed, and all laws, regulations, accounts, books, vouchers, memoranda, and documents relating to the company or to the business thereof; and to call for any information or explanation from the directors, auditors, trustees, bankers, manager, solicitor, secretary, officers, and servants of the company in respect of the said matters, or any of them. 40. That it shall be lawful for the board of directors, at any time to call the half-yearly general meeting either by advertising the same in any two or more of the London daily newspapers or by sending to each proprietor a circular letter, signed by the secretary of the company; such advertisement or circular letter to be inserted or sent at least

seven days and not more than fourteen days before the time fixed for holding the same, and to specify the day and hour and place of the meeting; but it shall not be incumbent to specify therein the object of such meeting, unless it be called for the object of dissolving the company. 41. That when and so often as a requisition for calling an extraordinary general meeting shall have been left at the office of the company by ten or more proprietors, holding in the aggregate not less than 1,000 shares, the board of directors shall call an extraordinary general meeting, either by advertising the same in any two or more of the London daily newspapers, or by sending to each proprietor a circular letter, signed by the secretary of the company; such advertisement or circular letter to be inserted or sent at least seven days before the time named in the requisition for holding the same, and to specify the day and hour and place of the meeting, but it shall not be incumbent to specify therein the object of such meeting, unless it shall be called for the purpose of dissolving the company. 104. That the directors of the company shall never exceed seven or be less than five, and the auditors of the company shall never exceed two."

In 1849 some of the proprietors of the company having become dissatisfied with the conduct of Inderwick, Cowan, and Johnson, as directors of the company, a requisition, dated the 31st of October 1849, was left at the office of the company, as follows:—"To the directors of the London Conveyance Company.—We, the undersigned, being twenty of the shareholders in the London Conveyance Company, holding together 1,000 shares, hereby request you to call an extraordinary general meeting of the shareholders in the said company, to be held on Thursday the 15th of November next, at twelve for one o'clock in the afternoon, at the George and Vulture Tavern, George Yard, Lombard Street, for the following purposes, that is to say: first, to appoint a committee of shareholders to investigate, with the assistance of an accountant, the books and accounts of the company, and inspect the stock and property of the company; secondly, to direct that such committee be furnished with a copy of the deed of settlement of the com-

pany; thirdly, to remove Messrs. Inderwick, Cowan, and Johnson from the office of directors, and to refer it to the foregoing committee to nominate and recommend fit and proper persons to be directors in their room, the names of such persons to be submitted for election at a future meeting of shareholders duly convened for that purpose." This document was signed by twenty proprietors, including three of the directors. The directors refused to call a meeting in pursuance of the requisition, on the ground that the objects of the requisition were not warranted by the deed of settlement. The requisitionists then called an extraordinary general meeting, by advertisement, for the 20th of December, in pursuance of the provisions of the eleventh clause of the settlement deed. The meeting accordingly took place on the 20th, and on the chair being taken, Inderwick read a protest, signed by himself, Cowan and Johnson, against the legality of the meeting, and declined to take part in it, and immediately thereupon he left the room. After hearing certain charges of misconduct brought forward by Snell, a director, against Inderwick, Cowan and Johnson, the three last-named persons were, by a unanimous resolution of the meeting, removed from the office of directors for misconduct, negligence, and other reasonable cause; and were from that time excluded by the other directors from all interference with the affairs of the company.

On the 3rd of January 1850 an extraordinary general meeting was held to fill up the vacancies in the direction occasioned by the removal of Inderwick, Cowan, and Johnson, when H. Harmes and Tanner were elected directors. At this meeting Inderwick and Cowan also attended merely to protest against the legality of the proceedings, and immediately thereupon retired. On the 21st of January, being the half-yearly general meeting, two other of the defendants, Donne and Seabourne, were also elected directors. Inderwick and Cowan then filed their bill on behalf of themselves and all other the proprietors of shares in the company, except the defendants, against the then directors and Johnson, charging that the election of the new directors was void, and that all acts done by them in that character were void; and

also charging that, under the 27th clause of the deed of settlement, the requisition to call a meeting for the removal of a director should clearly express the cause of removal, in order to give such director an opportunity of defending himself, which he could not do without knowing the nature of the charges to be brought against him, and also insisting that the charges made at the meeting of the 20th of December 1849, were unsupported by any evidence.

The bill prayed that until the hearing of the cause, or until the plaintiffs and the defendant Johnson respectively should be duly and lawfully removed from the office of directors, or should retire, or should otherwise cease to be directors, the defendants Snell, Hamilton, and Wheatley might be restrained by injunction from doing, authorizing, or permitting any act as directors or a director of the company, except in pursuance of orders of the board of directors, to be made at meetings of the board which the plaintiffs and Johnson should have had notice to attend, according to the 23rd clause of the company's deed, &c., and that in the mean time and until the plaintiffs and Johnson should be duly and lawfully removed, and also until the defendants Harmes, Tanner, Donne, and Seabourne respectively should be duly elected directors, the said four last-named defendants, and every of them and their respective officers, &c. might be restrained from doing, authorizing, or permitting any act as directors or a director of the company, &c.

On a motion for an injunction, upon notice supported by affidavits, Wigram, V.C. made the order in the terms of the prayer of the bill, on the ground that the shareholders, at the meeting of the 20th of December 1849, were misled by the statements and charges brought forward by Snell, which were unsupported by evidence, and many of which were unfounded. His Honour, however, was of opinion that if the meeting in question had been duly convened and the proceedings regularly conducted, the Court would have no right to sit as a court of appeal from the decision of that meeting.

The defendants, except Johnson, moved to discharge the order of the Vice Chancellor granting the injunction.

Mr. Bethell, Mr. W. M. James, The Solicitor General, and Mr. Glasse, appeared in support of the motion; and contended that the Court could not review the decision come to by the meeting, which was the only judge of the propriety of the removal of the directors; and the Court had no right to say what evidence should be satisfactory to the shareholders. The meeting was not of a judicial character, but was a meeting of a company of proprietors, considering a question whether certain persons should any longer continue to be their servants. Suspicion alone was a sufficient reasonable cause—*The Queen v. the Governors of the Darlington School* (1). Even if one or two of the statements made at the meeting were false, that would not vitiate the resolution. The plaintiffs, instead of attempting to meet the charges, deliberately absented themselves. On the question of the constitution of the bill, the following cases were cited—*Mozley v. Alston* (2), *Lord v. the Copper Miners Company* (3), *Ridgway v. the Hungerford Market Company* (4).

Mr. Wood and Mr. Bird, in support of the order of the Vice Chancellor.—In the case of the Darlington School the governors had power to remove at discretion. But in *In re Fremington School* (5), where the party was to be removed for neglect, misbehaviour, or other just cause, the Court held that he was not removable at discretion. The bill is properly constituted, as all the shareholders have an interest in seeing the trusts of the company's deed carried out. The Court has power to review the decision of the meeting, as it was obtained by false statements.

The Court did not call for a reply.

July 15.—LORD COMMISSIONER LANGDALE delivered the judgment of the Court.—This was a motion to discharge an order of Vice Chancellor Wigram, whereby it was ordered that the defend-

(1) 6 Q.B. Rep. 716; a.c. 14 Law J. Rep. (N.S.) Q.B. 67.

(2) 1 Phil. 798; s.c. 16 Law J. Rep. (N.S.) Chanc. 217.

(3) 2 Phil. 740; 1 Hall & Twells, 85; a.c. 18 Law J. Rep. (N.S.) Chanc. 65.

(4) 3 Ad. & E. 171; a.c. 4 Law J. Rep. (N.S.) K.B. 157.

(5) 10 Jur. 512.

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dants, Snell, Hamilton and Wheatley, should be restrained from doing, authorizing, or permitting any act as directors of the London Conveyance Company, except as therein mentioned, and also from preventing or interfering with the plaintiffs and the defendant Johnson in the exercise of their powers as directors of the company. There are other directions in the order, which it does not appear to be necessary to enumerate on this occasion. There were six directors of the company, Inderwick, Cowan, Johnson, Snell, Hamilton and Wheatley. In the year 1849 disputes took place. Mr. Snell charged Inderwick, Cowan and Johnson with misconduct; and at length an extraordinary general meeting of the shareholders, one of the objects of which was to remove Inderwick, Cowan and Johnson from being directors, was convened. The meeting was held on the 20th of December, and it was then resolved that Inderwick, Cowan and Johnson should be removed. This removal is the act principally complained of by the bill and in respect of which relief is sought. The plaintiffs allege, first, that the defendants, Snell and others, used improper and fraudulent means to procure the resolutions to be passed; secondly, that the meeting was illegally convened; and thirdly, that no legal grounds of removal were substantiated. On the other hand, the alleged fraud is denied; secondly, the meeting is alleged to have been convened and conducted with regularity; and thirdly, it is now contended it was lawfully in the power of the shareholders assembled at the time to consider and determine the question, whether the grounds of removal then alleged were or were not reasonable; and that the meeting, having considered that there were reasonable grounds of removal, this Court has no authority to controul its decision. As we do not think that there is any sufficient evidence of the fraud alleged, we have had to consider, first, whether the meeting was regularly convened; and, if so, secondly, whether the shareholders thus assembled had sufficient authority to remove the directors in the manner they did. On reading the clauses of the deed relating to the calling of meetings of shareholders, we are of opinion that the meeting of the 20th of December 1849

was regularly convened, and that it was lawful for the shareholders there assembled to consider and determine the question, whether the directors complained of should be removed. It was no legal objection to the consideration and determination of that question that notice was given that other questions were to be considered at the same meeting.

Now the 27th clause of the deed provides that an extraordinary general meeting specially called for the purpose may remove from his office any director or auditor for negligence, misconduct in office, or any other reasonable cause.

The argument for the plaintiffs rested on the allegation, that the general cause of removal referred to in the clause, being expressed to be "reasonable," prevents the power referred to from being a power to remove at pleasure, arbitrarily or capriciously; and made it requisite that the proceedings for exercising the power should be in its nature judicial, and that the reasonable cause should be such as a court of justice would consider good and sufficient.

If this argument could be sustained, all proceedings at such meetings would be subject to the review of the courts of justice, which would have to inquire whether the cause of removal which was charged was in their view reasonable, whether the charges were *boná fide* brought forward, whether they were substantiated by such evidence as the nature of the case required, and whether the conclusion was come to upon a due consideration of the charge and evidence. But the deed is silent as to these matters, and the question is, whether any such power of controul in the courts of justice is to be inferred from the words "reasonable cause" contained in the 27th clause; whether the expression "reasonable cause" contained in such a deed of a trading partnership can be held to be such a cause as, upon investigation in a court of justice, must be held to be *boná fide*, founded on sufficient evidence, and just; or whether it ought not to be held to mean such cause as in the opinion of the shareholders duly assembled shall be deemed reasonable. We think the latter is the true construction and effect of the deed. In a moral point of view, no doubt every charge of a cause

of removal ought to be made *boná fide*, substantiated by sufficient evidence, and determined on a due consideration of the charge and evidence, and those who act on other principles may be guilty of a moral offence; they may be very unjust; and those who (being present at the meeting) are innocently misled by the statements made to them, have no doubt a just right to complain that they have been led to concur in an unjust act. But the question is, whether by this deed the shareholders duly assembled at a general meeting might not or had not a right to remove a director for a cause which they thought reasonable without its being incumbent upon them to prove, or be able and prepared to prove, to this or any other court of justice, that the charge was true and the decision just, or that the case was substantiated after a due consideration of the evidence and charge. We cannot take upon ourselves to say that in the case of a trading partnership like this, this Court has, upon such a clause in the deed of partnership, jurisdiction or authority to determine whether by the unfounded speech of any supporter of the charge, the shareholders present may not have been misled or unduly influenced.

All such meetings are liable to be misled by false or erroneous statements; the amount of error or injustice thereby occasioned can rarely if ever be appreciated. This Court might inquire whether the meeting was regularly held, and in cases of fraud, clearly proved, might perhaps interfere with the acts done. But supposing the meeting to be regularly convened and held, the shareholders assembled at such meeting may exercise the powers given them by the deed; the effect of speeches and representations cannot be estimated, and for those who think themselves aggrieved by such representations or think the conclusion unreasonable, it would seem that the only remedy is present defence, by stating the truth and demanding time for investigation and proof; or the calling of another meeting at which the whole matter may be re-considered. The plaintiffs, objecting to this meeting and considering it illegal, protested against it, but abstained from attending, and therefore made no answer or

defence to and required no proof of the charges made against them. The adoption of this course was unfortunate; but does not afford any ground for the interference of this Court.

We are far from thinking that the charges made by Mr. Snell against the plaintiffs and Mr. Johnson were well founded. He appears to have made a very exaggerated and in some respects an unfounded statement, and in the present state of the evidence, if the question were whether the charges were well founded, we might think it our duty to say that they were not. But as the real question is, whether the shareholders at the meeting had not a right to remove directors for such causes as to them seemed reasonable, and as we think that on the true construction of the deed they had such right, we are of opinion that the order granting the injunction ought to be discharged.

WIGRAM, V.C. }
Jan. 23, 25. } WINTHROP v. MURRAY.

Debtor and Creditor—Agreement—Policy of Insurance—Warrant of Attorney.

A creditor, whose debt is collaterally secured by a policy of insurance on the life of one of several debtors, under an agreement that the debt shall not be recoverable during the payment of the premium by the debtors, has a right to enforce payment of the debt upon forfeiture of the policy, notwithstanding his having, subsequently to the forfeiture, obtained a renewal of the policy.

This was a suit by one of the directors and one of the two joint solicitors of the Universal Salvage Company against the defendant Murray (also a director), five other co-directors, the other joint solicitor, and the auditor of the company. The bill prayed for an injunction to restrain the defendant Murray from suing out execution upon a judgment entered up by him on the joint and several warrant of attorney of the plaintiffs and other defendants, under the following circumstances:—

At a meeting of the directors of the company in 1845, at which the plaintiffs and defendants were present, it was resolved to raise 3,000*l.* for the purposes of

the company, each of the parties (ten in number) being considered to be responsible as between themselves for the sum of 300*l.* The defendant Murray advanced the sum on the joint and several bonds of the plaintiffs and the other defendants, for six months, with interest at the rate of 10*l.* per cent. per annum. The time of repayment was afterwards extended, and the loan further secured by a policy from the Hand-in-Hand Insurance Company (of which Murray was also a director) for 5,000*l.*, on the life of one of the other defendants, and a warrant of attorney by the obligors of the bond to confess judgment for the sum of 6,150*l.* and costs. By the defeazance of the warrant of attorney it was declared that the judgment should not be entered up nor execution issued until default by the borrowers in payment of the premiums, &c. on the policy; and that in case of such default, it should be lawful for the defendant Murray to sign judgment and issue execution for principal and interest, according to an indenture of agreement of even date therewith. By this indenture the obligors of the bond covenanted to keep the policy on foot, and provided that in case of default it should be lawful for Murray to pay the premiums on the above policy, or to effect a like policy with another insurance company, to be held upon the same trusts with those of the above policy. It was also declared that no proceedings should be taken or execution issued under the warrant of attorney until the policy should become void or voidable; and that in the event of the sum of 5,000*l.* becoming payable under the policy, the defendant Murray should, after satisfaction of the principal, interest, and costs, pay over the surplus to the representatives of the defendant upon whose life the insurance had been effected. This transaction was subsequently confirmed by a general meeting of the shareholders of the Universal Salvage Company.

The policy became forfeited by non-payment of the premium within the thirty days limited by the company for the payment of it, and Murray then caused judgment to be entered up under the warrant of attorney, and gave notice of his intention to issue execution.

On the fourth day after the policy had become forfeited, the directors of the insurance company granted a renewal of the policy to the defendant Murray on payment by him of the arrears of premium.

The plaintiffs then filed the present bill, stating *inter alia* the above facts, and alleging ignorance of the custom of the above insurance company (stated to be peculiar to it and one other insurance company) of requiring the premiums of all policies effected by it to be paid on the 24th of June in every year, or within thirty days afterwards. It also stated that, on the application of the plaintiffs, the directors declined to grant them a renewal of the policy, without the concurrence of the defendant Murray, and that he refused to concur.

The bill prayed that the defendant Murray might be restrained by injunction from enforcing or availing himself of the judgment entered up, or the execution issued thereon; that he might be ordered to take all necessary steps to set aside the judgment and discharge the writ of execution issued by virtue of it; and that it might be declared that the renewed policy was a substitute for the original policy, the plaintiffs offering to repay to him the premium and fine (if any) paid on the renewal. The injunction prayed by the bill was subsequently granted, on payment into court of the sum of 3,000*l*.

Some of the co-directors, defendants, by their answers adopted the case of the plaintiffs. The others (except Murray) submitted that they and the plaintiffs claimed to have the fund in court applied in satisfaction of their liability upon the securities held by the defendant Murray, and save as therein appeared, denied that they claimed any interest in the subject-matter of the suit. It appeared from the evidence that the defendant Murray had received from the insurance company its usual annual circular, requiring payment of the premium on the policy, and that he had not forwarded it to the other parties, but that they had notice of the above custom of the insurance company before the premium became payable.

At the hearing of the cause,

The Solicitor General and *Mr. Elderton*, for the plaintiffs, submitted that judgment

could not be entered up under the warrant of attorney, nor execution issued, so long as the debt was secured by the policy of insurance, and that the present case was analogous to that between landlord and tenant, where for security of the rent a penalty or fine was reserved, but which would be remitted by the Court on payment of the rent.

Mr. W. W. Cooper, for Lord Talbot, a defendant in the same interest with that of the plaintiffs, argued that the defendant Murray had misled the other parties by not furnishing them with the circular received by him from the insurance office. He cited *Doe d. Pittman v. Sutton* (1).

Mr. Wood and *Mr. Glasse*, for the defendant Murray, urged his right to enforce the judgment upon forfeiture of the policy, and contended that this right had not been waived by his having obtained a renewal of the policy.

Mr. H. Cadman Jones, for the defendants Lord Ingestrie and Mr. Marshall, asked for their costs out of the fund in court, upon the ground that they had not disputed the right of the defendant Murray to enforce the judgment, nor insisted upon any relief as against him.

Mr. Elderton replied.

WIGRAM, V.C.—The only question in this case, as it appears to me, is, what was the real contract between the parties? Did such contract entitle the defendant Murray to sue the plaintiffs on the judgment entered up under the warrant of attorney? If it did so entitle him, it does not appear to me that any act has been done by him which, upon the principle of *Doe d. Pittman v. Sutton*, referred to by Mr. Cooper, could in any way alter his position. He has not done any act calculated to mislead the parties as to what their obligations were; and supposing the contract to be one which, according to the intention of the parties, evidenced by the instruments under their hands, entitled Mr. Murray to sue out execution upon the judgment, it does not appear to me to be a case in which the parties are entitled to relief in this court. In cases in which a money payment has been stipulated for, upon pain of forfeiture,

and that money payment has not been made upon the very day agreed upon, this Court will sometimes relieve against the forfeiture, by directing the party to make the payment with interest. So, in the common case of a lease, where a forfeiture of the estate and entry for the forfeiture are stipulated for on non-payment of the rent on the regular days of payment, this Court, deeming the right of entry to be intended as a mere security for the payment of the rent, will give relief against the forfeiture. Where, however, the thing stipulated for is not a mere money payment, but a collateral object is to be answered, it does not follow that this Court will relieve if the contract is not strictly performed. As in the case already mentioned, if the tenant does not pay his rent the Court will relieve against the forfeiture; but if the object be to insure and keep insured the demised premises so as to preserve uninterrupted the lessor's possession thereof, this Court does not relieve against the forfeiture. The question then is, how does this case stand upon the facts before me? There is no doubt that the borrowers were the proper parties to pay the premiums of insurance upon the policy, but Mr. Murray had stipulated for the payment of them by himself within a certain time before the expiration of the time for payment. If upon default in payment within the stipulated period by the borrowers, Mr. Murray had himself paid the premiums, and in the result the policy had been uninterruptedly kept on foot, the question would have been, whether, under the terms of the agreement, Mr. Murray, after having had the benefit of the policy, (whether by the act of the borrowers or by his own act), was at liberty to sue out execution upon the judgment. That, however, is not the case here; the time within which the premiums were payable, and within which the company was bound to accept payment, expired, and it was not until four days afterwards that Mr. Murray made the payment. During the interval of those four days there is no doubt that the policy was forfeited, and Mr. Murray had a right to enforce payment of his debt. It cannot be contended that he was bound to continue their creditor any longer than they continued to protect him by an uninterrupted policy. That being so, the real

question is, whether Mr. Murray by afterwards prevailing upon the office to renew the forfeited policy has thereby forfeited his right to enforce payment of the debt due to him. It is clear that Mr. Murray, by a more circuitous course, might by insurance have guarded himself against contingent loss, and I do not see that the act of the Hand-in-Hand Insurance Company, of which he was himself a director, allowing him to pay up the premiums after the forfeiture of the policy, can alter his rights.

The bill must, I think, be dismissed with costs as against the defendant Murray, to be taxed and paid out of the fund in court, but without costs as against the defendants who have sought the benefit of the suit; the residue of the fund to be paid to the defendant Murray towards satisfaction of his judgment debt. Those defendants who have not disputed Murray's right, but have not repudiated the suit cannot have their costs out of the fund. Unless they have repudiated the suit, they must be considered as having claimed the benefit of it.

Decree accordingly.

M.R. }
May 2, 3, 6. } OWEN v. HOMAN.

Principal and Surety—Creditor—Arrangements reserving Rights against Surety—Married Woman—Separate Estate—Receiver.

Farley & Co., bankers, were creditors of the firm of H, B. & Co., which consisted of M. A. H, and J. B. S. H, who was a married woman, having property settled for her separate use, joined as surety with J. B. in several promissory notes and bills of exchange to F. & Co., to secure the debt due to them from the firm of H, B. & Co. The firm of H, B. & Co., being greatly in debt to F. & Co., dissolved partnership. Articles of agreement were entered into between M. A. H. and J. B. and F. & Co., which provided that J. B. should carry on the business alone; that J. B. should pay the debt due to F. & Co. by monthly instalments. F. & Co. also agreed not to sue M. A. H. or require payment from her of the partnership debt; but the remedies of F. & Co. against the

sureties of M. A. H. and J. B. were expressly reserved. This bill was filed by F. & Co. to make the securities of S. H. as surety available; and upon a motion for a receiver of the income of her separate property,—Held, that the deed made a material alteration in the relation subsisting between the creditors and principal debtors, but that from the state of the authorities respecting the reservation of the rights of creditors against sureties, the Court was bound to give effect to what appeared to have been the law as administered in this court, and if the defendant could not give security for what the plaintiffs might recover out of her settled estate, to appoint a receiver to secure the fruit of the suit if the law should be ultimately established in favour of the plaintiffs.

This motion, asked on behalf of the plaintiffs, John Owen & Matthew Gutch, for the appointment of a receiver of the rents and profits, interest, dividends, and income arising from the real and personal estate comprised in an indenture, dated the 28th of November 1836, by which the whole was settled upon the defendant, Sarah Homan, for her separate use for life. The plaintiffs, J. Owen and M. Gutch, carried on the business of bankers at Worcester, under the firm of Farley & Co.; but since 1844 the persons constituting this banking firm had undergone various changes. In 1844, the firm of Harris, Bowers & Co., which then consisted of Mary Ann Harris, since deceased, and John Bowers, carried on the business of grocers, provision-dealers and wine-merchants at Worcester. They kept an account with Messrs. Farley & Co., which was overdrawn in December 1844. Messrs. Farley & Co. applied to Harris, Bowers & Co. either for payment or security for the balance of the account, and in consequence John Bowers applied to the defendant, Sarah Homan, his aunt, and on the 28th of December 1844 she joined with him in a promissory note to Farley & Co. for the sum of 1,000*l.*, the balance then due. On the 2nd of April 1845 Sarah Homan again joined with John Bowers in another promissory note to Messrs. Farley & Co. for 500*l.* On the 15th of June 1846 Sarah Homan accepted a bill of exchange for 1,000*l.*, drawn by John Bowers, as a joint

security to Farley & Co. for monies due to them. On the 18th of October 1847 Sarah Homan again accepted another bill of exchange for 500*l.*, drawn by John Bowers. In January 1848 Harris, Bowers & Co. applied for further advances from Farley & Co., and by arrangement between the two firms the two bills of exchange for 1,000*l.* and 500*l.* were delivered up, and Farley & Co. advanced to Harris, Bowers & Co. a sum of 1,000*l.* and received a promissory note, dated the 20th of January 1848, by which John Bowers and Sarah Homan made themselves jointly liable to Farley & Co. for the sum of 3,000*l.* Upon the dissolution of the firm of Harris, Bowers & Co., articles of agreement were entered into, dated the 22nd of December 1848, between Mary Ann Harris of the first part, John Bowers of the second part, and the plaintiffs of the third part, by which it was agreed that John Bowers should take upon himself the payment and discharge of all the outstanding debts and liabilities of the firm of Harris, Bowers & Co., including particularly the sum of 17,448*l.* due to Farley & Co., as ascertained upon a settlement of account on the 2nd of December then instant, together with interest upon the same after the rate of 5*l.* per cent. per annum. John Bowers also, in consideration of the retirement of Mary Ann Harris from the partnership, undertook to give up to her, within three years, the title deeds of the house and premises belonging to her where the business was carried on, and which had been deposited with Farley & Co. as security. That John Bowers should carry on the business on his own account, and pay an annuity of 100*l.* a-year to Mary Ann Harris until the title deeds were delivered up to her. That John Bowers should pay to Farley & Co. the debt due to them, with interest, by monthly instalments of 200*l.*; and in case of any default that the whole of the debt should be immediately payable. That John Bowers should give a bond to Farley & Co. as a further security for the debt and instalments, to be taken only as an additional or collateral security for the payment of the debt due from the partnership, but not as a release, satisfaction, or extinguishment of the debt or of the liability of Mary Ann Harris, but that Farley & Co. should have the same

remedies for the recovery of the said debt as if the bond had not been taken. That in the mean time, while the payment of such instalments should be made, the existing sureties for the debt or any part thereof due to Farley & Co., except Messrs. Scott, Jeremy and Parker, should not be proceeded against so long as the liabilities of such sureties were kept on foot and renewed from time to time, and were not allowed to run beyond the Statute of Limitations or within one year thereof. But in case of the death, bankruptcy, or insolvency of any surety, then the whole amount due from him or her was to be immediately paid to and recoverable by Farley & Co. In case default was made by John Bowers in payment of any or either of the instalments of 200*l.*, or if the sureties or any or either of them should die, become bankrupt or insolvent, or if the liabilities of sureties, or any or either of them, should not be duly renewed and kept on foot, or should at any time be within one year of the Statute of Limitations, then and in any of such cases the debts of the sureties were to be immediately payable and recoverable by Farley & Co., and they were to be at liberty to take proceedings at law or in equity against all or any or either of such sureties. That the debt of 17,448*l.* should bear interest at the rate of 5*l.* per cent. per annum, from the 2nd of December 1848 until the whole should be fully paid with interest. That John Bowers should dispose of the wine and spirit trade, and the monies arising from the sale were to be paid to Farley & Co. towards the reduction of their debt; but if it should not be disposed of by private contract within three calendar months the wines and spirits were to be sold by auction and the monies to arise therefrom were to be paid to Farley & Co. towards the reduction of their debt.

Messrs. Owen & Gutch, in consideration of the provisions of the agreement agreed with Mary Ann Harris not to take or institute any proceedings at law, in equity or in bankruptcy against her to recover from her the debt of 17,448*l.* or any part thereof, except so far as might be necessary to recover the same from John Bowers by suing or proceeding against her jointly with him, and except that they should be at liberty to require Mary Ann Harris to

execute a mortgage, which she agreed to do, of the house and premises in the Corn Market, Worcester, as a security to them, which was to contain either powers or trusts for sale with the other usual and necessary provisions, except a covenant from her to pay the debt. That until such mortgage deed should be executed, the title deeds and the premises were to remain subject to the debt and interest. It was also provided in case J. Owen and M. Gutch should bring any action or take any proceedings at law or in equity against M. A. Harris and John Bowers to recover any portion of the debt from J. Bowers, that they should not levy execution against M. A. Harris or her real or personal estate. It was also agreed that the expenses of carrying out the agreement, and the expenses of Farley & Co.'s solicitors up to that time should be paid by John Bowers, and that the agreement or any article, clause, matter, or thing therein contained, or the giving or accepting of the bond payable by instalments should not in anywise or in any event be deemed or construed to prejudice or annul or otherwise affect the rights and remedies of Farley & Co. upon or against any person or persons liable as sureties or otherwise as drawers, indorsers, makers or acceptors of any bill or bills of exchange or promissory notes or note or other securities which Farley & Co. then held, but that all such persons should be liable thereon by virtue of such securities to the same extent, and in the same manner as they otherwise would have been had the articles not been made or the bond given. That Farley & Co. should not take or institute any proceedings at law or in equity against the said John Bowers so long as the monthly instalments of 200*l.* were duly paid, except on the happening of the events before mentioned or any of them, and except at the request of the sureties or any of them, and also in the event of John Bowers making default in any or either of the articles entered into by him.

John Bowers continued to carry on the business by himself until April 1849 when he took his brother Joseph and his sister Sarah into partnership, and the business was continued under the style of Bowers, Bowers & Co.

On the 25th of August 1849, a fiat in

bankruptcy was issued against John Bowers, under which he was declared a bankrupt.

On the 29th of August 1849 a joint and several fiat was issued against all the partners in the firm of Bowers, Bowers & Co. under which they were declared bankrupt.

On the 28th of November 1836, upon the marriage of John Homan with Sarah his wife, her real and personal estates were conveyed to trustees upon trust for her separate use during the joint lives of herself and her husband, with an absolute power of disposing of the same by deed or will, and in default of such appointment, in case she survived her husband, upon trust for her absolutely, and if she died in his lifetime in trust for her heirs and next-of-kin respectively.

In August 1849 Mary Ann Harris died. This bill was filed in November 1849, praying for a declaration that the rents and profits of the real estates and of the money and other personal estate comprised in the settlement of the 28th of November 1836, to which Sarah Homan was entitled for her separate use, were liable to pay to the plaintiffs as the surviving partners in the firm of Farley & Co. the principal and interest monies secured by the three promissory notes of the 28th of December 1844, the 2nd of April 1845, and the 20th of January 1848, and that such principal and interest monies might be paid out of such rents and profits, sums of money and personal estate, or at least out of the rents and profits, and the interest, dividends and income of the said sums of money and other personal estate comprised in the said settlement to which the said defendant, Sarah Homan, was entitled for her separate use; the plaintiffs offering to account for any dividends or other monies which might be received by them from the respective estates of John Bowers and Mary Ann Harris on account of such promissory notes: and that a receiver might be appointed of the rents and profits, interest and dividends, and other income to arise from the settled property.

Mrs. Homan, by her answer, said that she was induced to sign the promissory notes, under fraudulent misrepresentations made to her by John Bowers, with the cognizance of Farley & Co., who were, as alleged, parties to the fraud. She also

insisted that the plaintiffs had wholly released and discharged her as surety from the payment of any part of the money due from Harris, Bowers & Co. to Farley & Co. by entering into the agreement of the 22nd of December 1848, with Mary Ann Harris, and that large sums of money had been received by Farley & Co. after the promissory notes came into the hands of the previous members of the firm more than sufficient to pay them.

Mr. Turner and *Mr. Hallett*, in support of the motion.—The defendant says that a fraud has been committed against her, but that is no defence to the claim of the bankers. It is also insisted that a bill of exchange can be no security for a running account, and that the defendant is discharged in consequence of the arrangement between the two firms of Harris, Bowers & Co. and Farley & Co.: but the parties might enter into a composition with creditors, and reserve their remedy against sureties—*Boulbee v. Stubbs* (1), *Burke's case* (2), *Pitman on Principal and Surety*, p. 182. But the defendant as surety might after the agreement have required the creditors to sue the principal debtors, or she might herself have paid the debt, and sued the principal debtors to obtain the money paid: the situation of the surety is no worse, as the release or the agreement of the principal debtors is limited by the reservation of the remedies which the creditors had against the sureties.

Mr. Roupell and *Mr. Elderton*, contra.—The security given was for part of the balance of an account due, and all the subsequent securities were given for the same purpose, and this account was current and continuing; but the plaintiffs and J. Bowers had been guilty of a fraud towards the defendant, and had sought to continue her liability, notwithstanding the plaintiffs had received money more than sufficient to satisfy the bills of exchange given by the defendant: but assuming that not to have been the case, the arrangements entered into between the plaintiffs and the firm of Harris, Bowers & Co., the principal

(1) 18 Ves. 20.

(2) Referred to 18 Ves. 26.

debtors released the surety, who never contracted to continue her liability through a series of complicated dealings. The Court, therefore, would not appoint a receiver.—

Ex parte Gifford, 6 Ves. 805.

The Governor and Company of the Bank of Ireland v. Beresford, 6 Dow, 233.

Samuell v. Howarth, 3 Mer. 272.

Bowmaker v. Moore, 7 Price, 223.

Ex parte Glendinning, Buck, 517.

English v. Darley, 2 Bos. & P. 61; s. c. 3 Esp. 49.

Bonser v. Cox, 4 Beav. 379; 6 Beav. 110; s. c. 10 Law J. Rep. (N.S.) Chanc. 395.

Smith v. Winter, 4 Mee. & W. 454; s. c. 8 Law J. Rep. (N.S.) Exch. 34.

Hall v. Hutchons, 3 Myl. & K. 426; s. c. 3 Law J. Rep. (N.S.) Chanc. 45.

Mayhew v. Crickett, 2 Swanst. 185—190; s. c. 1 Wils. 418.

Nicholson v. Revill, 4 Ad. & E. 675; s. c. 6 Nev. & M. 192; 5 Law J. Rep. (N.S.) K.B. 129.

Kearsley v. Cole, 16 Mee. & W. 128; s. c. 16 Law J. Rep. (N.S.) Exch. 115.

Deering v. the Earl of Winchelsea, 2 Bos. & P. 270; s. c. 1 Cox, 318.

Henniker v. Wigg, 4 Q.B. Rep. 792.

Mr. Turner, in reply.—Before the execution of the deed of the 22nd of December 1848, Mrs. Homan, as surety, was liable to pay the debts for which she had made herself responsible, and she had a right to call upon the creditors to put their remedies in force against the principal debtors, or she might have paid the debt itself and have sued the principal debtors. These rights are not varied by the deed, which was erroneously considered a release of Mary Ann Harris, but she was no party to the promissory notes; the plaintiffs undertook not to levy execution against M. A. Harris, but beyond that the agreement was no release to her. There is a great difference between a release and a covenant not to sue: the one destroys the right to sue, but the other continues it as to a third party. In this case, John Bowers took upon himself the payment of the debts ascertained to be due on the 2nd of December 1848; but every means were taken to keep on foot the claims against sureties, and the

reservation of the rights of the parties prevented any release—*Rice v. Gordon* (3).

May 6.—THE MASTER OF THE ROLLS.
—The right of the parties in the result of this motion must depend upon the question whether the surety is or is not liable to pay the debt of the principal debtors, notwithstanding the change in the relation between the creditors and the principal debtors, which is effected by a clause in the agreement making that new relationship, and another clause reserving the remedies of the creditors as against the surety. There does not appear to be any distinct decision upon the point, but the law has been frequently declared by Lord Eldon, who on various occasions took notice of *Burke's case*. I find it first mentioned in *English v. Darley*, where it is said that Richard Burke being co-surety for an annuity, the grantee gave time to the principal; it was argued that Mr. Burke was not relieved, but that the principal was. It was answered that the grantee could make no demand upon the co-surety, because he must by so doing enforce payment from the principal contrary to the agreement. From this statement it may be justly inferred that if the grantee by giving time to the principal had reserved to himself the right to enforce payment from the principal at the instance of the surety, the surety would not have been released, but such does not appear to have been the decision; on the contrary, it appears that the surety was considered to be released, which would not have been the case if the remedy had been reserved. It is no doubt to be inferred that if the remedy had been reserved there would not have been relief.

The case is again mentioned in *Ex parte Gifford*, and there Lord Eldon is reported to have said "As to the receipt, the creditor contends there is no difference whether there is an express reservation of the remedies against the co-sureties, but that distinction has been taken. At the time of *Mr. Richard Burke's case*, Lord Thurlow admitted that if there is a reserve of the remedies against the others, there is consent of the party with whom the com-

position is made; and if out of that a demand arises against him, it is a demand which began to exist with his consent expressed in the terms of the contract, and under some circumstances wisely and prudently given; for the party would not have entered into the contract unless he was allowed to contract for that remedy over against the co-sureties." *Ex parte Gifford* was also referred to in *Nicholson v. Revill*; it was there argued that Lord Eldon had expressed an opinion that a joint debtee might release one of his debtors, and yet by using some language of reservation in the agreement between himself and such debtor, keep his remedy entire against the others, even without consulting them. The doctrine implied in this argument was not approved of by the Court of King's Bench, and it certainly deserves consideration whether in that case, where there would be a release of the co-surety, there must not be a release of the surety. But that was not the point raised in the case, which was of a co-debtee and not of a surety.

In the case of *Boulbee v. Stubbs*, the question seems to have been whether certain words in the agreement between the creditor and the principal debtor amounted to a reservation of the remedies against the surety, and Lord Eldon states that in one view of the case "it put an end to the right against the surety; if, on the other hand, the object was to give as extensive a remedy as was given in *Mr. Burke's case*, then that case and many others must govern" the case then before him. And in the report he subsequently referred to the case thus:—"It is clear that if he might have been forthwith sued and execution had against him as the fruit of that suit, the surety is not injured; and on the other hand, that in general, if time is given to the principal, the surety is discharged. The objection to the reserve of remedy against the surety consists in the interest the principal has that the surety shall not be applied to. It is said that the principal cannot by contract deprive himself of the benefit derived from that forbearance, and there certainly have been decisions that if time is given to the principal, reserving the right to go against the surety, the principal cannot raise the objection upon

his right to time as against the surety; as there is the contract of the principal arising out of the contract for reserve against the surety, that the latter, if the creditor goes against him, shall not be deprived of the benefit of the contract as against the principal. That was *Burke's case*, as to which I will look at the note I have. If the contract for reserve against the surety prevents his remedy against the principal, that contract for reserve will not do; but the question is, whether it does in law deprive the surety of that benefit." In that case the surety was protected, as I understand it. It is to be regretted that there is no account of the result of Lord Eldon's looking at that case, because there, and in *The Bank of Ireland v. Beresford*, it appears there had been a decision which, if it exists, has not been found. In *Ex parte Glendinning*, he expressed himself with the utmost precision, which no doubt he meant:—"If a man by deed agree to give his principal debtor time, and in the deed expressly stipulate for the reservation of all his remedies against other persons, they shall still remain liable notwithstanding the arrangement between their principal and the creditor." He does not state the principle or the reason upon which it was done, but he immediately goes on:—"But if the creditor do not reserve his remedies, the deed will operate as a discharge to the sureties; which rule I conceive is founded upon this maxim, that it is against conscience and equity that you should put persons in a situation in which they have not contracted to be placed. It may be said the surety is not injured by the creditor's arrangement with the debtor, and in many cases the compromise may happen to be extremely advantageous to him. But this is no answer to a surety who stands upon his contract. Besides, it is evident, creditors would not pursue their actions with the same pressure and activity if they were not urged on by the consideration that any laches on their part would discharge the sureties." Then he says, "Ever since *Mr. Richard Burke's case*, the law has been clearly settled, and it is now perfectly understood, that unless the creditor reserve his remedies he discharges the surety by compounding with the principal, and the reservation must be upon the face of the

instrument by which the parties make the compromise; for evidence cannot be admitted to explain or vary the effect of the instrument."

There is not the least doubt of what the clear expression of Lord Eldon's understanding of the law was in that matter; but in this case there is a very material alteration in the relation subsisting between the creditors and the principal debtors; and, in the absence of authority, I should not have thought that the reservation of the right of the creditors against the surety prevented that change of relation from making a very material change in the position of the surety, but the words used by Lord Eldon on so many occasions for near twenty years make it imperative on me to consider what he states as the law administered in this court. I therefore feel myself bound to give the plaintiffs the benefit of it, so far at least as to secure to them the fruit of the suit, if the law should ultimately be established in their favour; but I do not think I ought to appoint a receiver if the defendant can find fitting or sufficient security in the meanwhile. The motion may, therefore, stand over for some time, to give the defendant an opportunity of offering security, if it can be given, for payment to the plaintiffs of such sum of money as the plaintiffs may recover in this suit out of her settled estates.

L.C. }
Jan. 31; } MARKS v. SOLOMONS.
Feb. 1. }

Will, Construction of.

The testator, by his will, gave the interest of monies invested by him in certain loan societies (naming them) to his wife for life, with remainder over; he then gave all monies belonging to him "in the Friendly Society, called the Lodge of Friends Society and all other societies" to his wife absolutely:—Held, reversing the decision below, that the words "all other societies" must mean, societies ejusdem generis with that immediately preceding, namely, friendly societies, and that the widow took a life interest only in the monies invested in the loan societies.

Where the words of a will admit of two

interpretations, the Court will prefer that construction which will make the whole will consistent.

George Joel, by his will, dated the 20th of November 1845, after giving certain specific and pecuniary legacies to his wife, gave as follows—"And I also bequeath the interest of all monies invested by me in different loan societies as follows: in the Hand-in-Hand Loan Society, held at the Paul Pindar public house, Bishopsgate Street, in the city of London, the Commercial Tradesmen's Loan Society, Aldersgate Street, and also in the Crown Loan Society, Crown Street, Finsbury, as well as all other property of every nature and kind whatsoever, during her life. And I direct that all my stock in trade be sold by public auction forthwith after my decease; and all my book-debts and securities for money of every sort or kind to be got in and collected as soon as possible, and the same from time to time, together with the produce of the said sale by auction; and that the produce thereof, together with the money that may be standing in my name at my bankers at the time of my decease, be placed out at interest in the Bank of England by my executors hereafter named, for the benefit of my said wife, Mary Joel as aforesaid, during her life, together with the said other interest, and all monies so invested at the said loan societies, to be paid to her quarterly. And from and after her decease I give and bequeath to Humphrey Marks and George Marks, sons of Solomon Marks, the sum of 200*l.* each, and to Kitty Marks my granddaughter, the sum of 100*l.*, and to Aaron Marks the sum of 100*l.*, and to each other of my surviving grandchildren, sons and daughters lawfully begotten by my daughter, Amelia Marks, when they respectively arrive at the age of twenty-one years the sum of 50*l.* each. And in case any or either of them depart this life before they arrive at the age of twenty-one years, the share or shares of such deceased shall be divided and paid, together with all overplus monies, be paid to the survivors then living share and share alike."

The testator, after giving certain pecuniary legacies, proceeded as follows:—"And as to the remaining part of the said

estate, the same to be put out at interest in the Bank of England as aforesaid, for the benefit of my said wife, Mary Joel, during her life. And from and after her decease then the said legacies and payments to be paid to my grandchildren, sons and daughters, as aforesaid. And my will is, that all monies be kept in the Bank of England for the benefit of the parties entitled to the same as aforesaid after the decease of my said wife." "And my will is, that the monies belonging to me in the friendly society called the Lodge of Friends Society, and all other societies, when received, shall go and belong to my wife Mary Joel, for her own use and benefit." And he appointed his wife Mary Joel, Henry Solomons and Aaron Hart executrix and executors. By a codicil Joseph Townsend was afterwards substituted as executor in the place of Aaron Hart.

The bill was filed by the children of Amelia Marks, the testator's daughter, against the executors, Mary Joel the widow, Solomon Marks and Amelia his wife, for the administration of the testator's estate; and the principal question was, whether upon the true construction of the will, Mary Joel, the widow, was entitled absolutely to or only to a life interest in the funds invested by the testator in the loan societies mentioned in his will.

The Master, by his report, found that the testator at the time of his death had 500*l.* invested in the Commercial Tradesmen's Loan Society; 432*l.* 13*s.* 6*d.* in the Hand-in-Hand Loan Society; and 40*l.* 13*s.* 9*d.* in the Crown Loan Society; but that he had no monies in The Lodge of Friends Society, or in any other society. The cause coming on for further directions, before the Vice Chancellor of England, it was declared that, according to the true construction of the will, Mary Joel was absolutely entitled to the sums invested by the testator in the loan societies mentioned in the Master's report.

The plaintiffs appealed from this decree.

Mr. Malins and *Mr. Hetherington*, in support of the appeal.

Mr. Stuart and *Mr. Baggallay*, contra.

The LORD CHANCELLOR.—Upon reference to the acts of parliament relating to loan societies and friendly societies, the

distinction between the two societies is apparent. Loan societies are those in which money is advanced, upon which interest is payable; but the capital also belongs to the party investing it.

With respect to friendly societies, as distinguished from the others, there certain periodical payments are made in respect of certain sums of money to be paid upon a future event. These latter are, in fact, in the nature of insurance societies. This is the leading distinction between the two. I assume that the testator had property in both classes of societies. He gives the money he had invested in the loan societies to his wife for life, and, after her death, to his grandchildren, with benefit of survivorship. Afterwards he proceeds, "And my will is, that the monies belonging to me in the friendly society called 'The Lodge of Friends Society' and all other societies, when received, shall go and belong to my wife Mary Joel for her own use and benefit." The words "all other societies" must be construed with reference to the intention which the testator has expressed in the other parts of his will. "All other societies" must mean, all other societies *ejusdem generis* with that immediately before described, namely, friendly societies. You must look to the other dispositions of the will to see what the testator means; and where the expression may be referable to two different things, you must choose that which will make all parts of the will consistent. Again, he gives to his wife the interest of his monies in certain loan societies, enumerating them, and gives the capital over after her death. After that he ceases to speak of loan societies; and he gives his wife all his "monies" in a particular friendly society, and all other societies, when received. Having regard to the subject-matter then present to his mind, he must be understood to mean by that "all other friendly societies." It is the obvious meaning of the words used; he intends to give an additional advantage to his widow. This construction makes all parts of the will consistent, whereas the other makes one bequest entirely overturn the other. The case of *Vaughan v. Buck* (1) is not at all like the present case. The

(1) 1 Phil. 75.

construction put upon the will by the Vice Chancellor cannot be supported. The declaration must be that the widow is entitled for life only to the interest of all monies invested by the testator in loan societies, and to the interest of the general residue when invested.

L.C. } ADAMS v. THE LONDON AND
Feb. 12, 18; } BLACKWALL RAILWAY
July 4. } COMPANY.

Company—Lands Clauses Consolidation Act, 1845—Specific Performance—Notice to treat—Equity.

On the 9th of November 1847, the railway company sent notice to the plaintiffs that certain portions of their premises were required for the purposes of the railway; and on the 30th of November the plaintiffs sent in particulars of their claim. After a fruitless negotiation between the parties, the company, on the 30th of June 1848, gave the plaintiffs formal notice of their intention to enter and take possession, and the plaintiffs not consenting to such entry, the company, under the 85th section of the *Lands Clauses Consolidation Act*, procured a valuation of the premises, and paid the amount into the Bank, and gave the bond as required by the act, and entered into possession on the 20th of July 1848. The plaintiffs then abandoned their claim of the 30th of November 1847, and required the company to take the necessary steps for summoning a jury to assess compensation. The company refusing to summon a jury, on the 2nd of April 1849 the plaintiffs filed their bill, praying a declaration that the company were bound to complete the purchase according to the notice of the 9th of November 1847, and that the company might be ordered to take all proper proceedings under the act to settle the amount of compensation. A demurrer by the company for want of equity was allowed, on the ground that the company having taken possession under the 85th section, the plaintiffs ought to have sent in particulars of their claim, which claim would have become an absolute right in case the company did not agree, or did not proceed within twenty-one days to summon a jury.

This was an appeal from the decision of Wigram, V.C., overruling the demurrer of the company. The statements and prayer of the bill are fully set out in the report of the original hearing (1).

Mr. Wood and Mr. Bigg appeared in support of the appeal.

The Solicitor General and Mr. J. H. Law, for the respondents.

July 4.—The LORD CHANCELLOR.—If, from the terms of the prayer of the bill, and the fact that a demurrer to it has been overruled, it should be inferred that this Court will generally lend its assistance to compel the performance of the provisions of the acts under which railways are formed and maintained, a proposition would be raised, which, if established, would lead to consequences of the most serious importance. I do not, however, think that any such inference can fairly be drawn by the decision of Wigram, V.C. in this case. On examination of what fell from his Honour in giving judgment, it will, I think, be found that it turned much upon the special allegations in the bill, constituting in his Honour's opinion a statement of fact different from what appears to me to be the true construction of such statements. His Honour considers the case stated in the bill to amount to this: that the company had given the notice of the 9th of November, and had not proceeded to summon a jury under the act, in which case his Honour thought that this Court had jurisdiction to enforce the further proceedings, resting upon the case of *Walker v. the Eastern Counties Railway Company* (2). As I do not consider this to be the true construction of the facts as stated in the bill, I shall abstain from any observations upon the supposed rule of law, or the case referred to, and purpose, first, to examine the various allegations of the bill, shewing the relative situation of the parties, and then to consider the provisions of the act of 1845, as applicable to the facts so stated.

The bill states the first notice and the claim of the plaintiffs; but that notice was abandoned, and the second notice of the 9th

(1) 18 Law J. Rep. (N.S.) Chanc. 357.

(2) 6 Hare, 594.

of November 1847 substituted for it, upon which the plaintiffs, according to the provisions of the act, put in a claim, dated the 30th of November 1847, for 776*l.*, and a deduction of 86*l.* from the rent of 136*l.*, which led to a negotiation terminating in an agreement, under which the plaintiffs were to receive 956*l.* compensation, and have a deduction of 74*l.* from the rent; but this agreement having been afterwards repudiated by both parties, and the bill not praying any relief under it, but adversely to it, forms no part of the case now existing between the parties. The bill then, after stating that a negotiation had taken place for the purchase by the company of other premises with which the plaintiffs refused to proceed, and that they never agreed to an arbitration, and that they thereby repudiated their former claim and were not bound by it, further injuries having been sustained, and that the company had done the same, proceeded to state fruitless negotiation for a settlement by arbitration; that the plaintiffs ultimately abandoned that course of proceeding, and called upon the company to take the necessary steps, within one month, to summon a jury in order that the question at issue might be decided by them. The bill having stated a notice, dated the 30th of June 1848, given by the company for taking possession before payment, under the 85th section of the Lands Clauses Consolidation Act, and the proceedings accordingly, and possession taken, alleged that the estimated amount of compensation and damage under that proceeding was founded in error, and the plaintiffs were entitled to much more and to a larger amount than their former claim. From this short abstract it will be seen, that the only facts subsisting between the parties which can affect their right are the second notice of the 9th of November 1847, the notice of the 30th of June 1848, and the proceedings which followed, under the 85th section of the Lands Clauses Consolidation Act; this claim of the plaintiffs, under the second notice, and the agreement which followed it, having, as the bill alleged, been repudiated and abandoned by both parties, and forming no part of the plaintiffs' case.

Such, therefore, are the facts to which the law, which is to be found in the Lands

Clauses Consolidation Act, is to be applied. The Lands Clauses Consolidation Act, 8 Vict. c. 18, after providing the means by which the value of the land required by the company is to be ascertained by the 84th section, prohibits the company from taking possession until such value shall have been paid or secured, as thereby provided, and by the 89th section imposes severe penalties for their taking possession; but, by the 85th section, when a company are desirous of taking possession before any agreement has been entered into, or award made, or verdict given, they are authorized so to take possession upon payment into the Bank of the sum claimed, or fixed by a surveyor appointed by two Justices as the value of the property, and giving a bond with sureties for payment of the purchase-money and compensation to be ascertained under the provisions of the act; and by the 68th section, any party entitled to land taken or injured by the company, for which they have not made satisfaction, is to give notice to the company stating his interest in the lands, and the compensation he claims, and whether he wishes to proceed by arbitration or before a jury; and if the latter, the company are to pay the sums claimed, and enter into an agreement for the purpose, or issue their warrant for a jury within twenty-one days after the notice, and in default are made liable to pay the compensation claimed, which the party is to recover by action in one of the superior courts, with costs.

The Vice Chancellor seems to have considered, that notwithstanding the provisions of the 68th section, and the taking possession under the 85th section, the relative position of the parties is to be considered as if nothing had taken place beyond the notice of the 9th of November 1847, and that such notice having constituted the relation of vendor and purchaser, this Court could enforce the performance of all the incidents to that relationship. It is, I think, quite true, that to a certain extent, and for certain purposes, the compulsory taking of lands under the Railway Acts places the companies and the owners in the relative situation of purchasers and vendors, such as fixing, as between them, the lands to be taken, which was all that was decided in *Stone v. the Com-*

mercail Railway Company (3); but it by no means follows that this Court will, therefore, take on itself the specific performance of such sales. If, indeed, the proceedings lead to an agreement, the Court might do so: for then, although originating in the compulsory power, the purchase would be effected under a private agreement, and so other cases may arise. But, whether, if the case depend entirely upon the notice of taking the lands, not followed by any agreement, or indeed by any claim on the part of the owner, for such is the present case as stated by the bill, the amount of purchase-money, therefore, not being ascertained, this Court would take upon itself to enforce the contract, is a question upon which I do not think it necessary to express any opinion, because I think the circumstances of this case call for a decision founded upon very different principles.

It was properly observed, in argument, that the power of summoning a jury was by the act given exclusively to the promoters, and that the owner of lands had no power under the act of compelling them to do so, and therefore the Court's original jurisdiction over contracting parties might be exercised for the purpose of giving to the owner that compensation to which he is under the act entitled, which assumes that such original jurisdiction existed. The facts seem to be, that the legislature, having prohibited the promoters from interfering with the land until the compensation was paid or secured, considered that this afforded sufficient security to the owners that the promoters would proceed to have the value ascertained by a jury; for this act adopts a very different course where such pressure would not exist, as under the 68th section. In the case provided for in that section, the promoters, being in possession, and not having paid the compensation, are not left to their own discretion, or to the pressure of their own wants, to induce them to summon a jury, but a remedy prompt and effectual is given to the owners to compel them to do so. It is to make a claim, stating the amount of compensation required, and if the promoters do not enter into an agreement to pay the same, or

within twenty-one days issue their warrant for a jury, they are to be liable to pay the sum claimed, to be recovered, with costs, in an action in one of the superior courts. That the situation of the parties is precisely that contemplated by the 68th section, is, I think, very clear; for I concur with Wigram, V.C. in thinking that this 68th section applies to cases in which possession has been taken under the 85th section; but if that be so, the initiative for summoning a jury is not cast upon the promoters, but upon the owner, who is to make his claim, and thereby give the promoters an opportunity of settling his demand without litigation; and the owner has the remedy of having his claim converted into a right, if the promoters shall delay for twenty-one days, for which he has a remedy by action.

Now, although an old jurisdiction is not taken away by a new remedy being given, yet, if a new right be given and a special remedy provided for enforcing it, such remedy must be pursued. Here there is clearly a new right—that is, a right to compensation for land lawfully taken possession of by another. Under the powers of the act a remedy is also given, for the owner is only to make a claim, and he obtains a lawful title to all he claims, unless the promoters can reduce it by the verdict of a jury. The Vice Chancellor seems to adopt this view of the case; and if the 68th section had been considered by him as regulating the rights of the parties, he would not, I apprehend, have overruled the demurrer; he was, however, of opinion, in conformity with his decision in *Walker v. the Eastern Counties Railway Company*, that the notice of the 9th of November 1847 having given to this Court jurisdiction as a contract of purchase, the 68th section had not taken it away, but that the owners were at liberty to resort to this jurisdiction under the notice. Now, abstaining from giving any opinion as to the effect of that position in giving this Court jurisdiction, when nothing more has been done, I think that what subsequently took place in the present case essentially altered the position of the parties. The act does not consider the notice as constituting a contract, but as a preliminary step, a bringing of the parties together, who are afterwards to settle the matter between them

by agreement, arbitration, or the verdict of a jury. In the present case the notice by the promoters was met by a claim on behalf of the owners, and a regular agreement, according to the statement in the bill, entered into between the parties. So far the object of the notice of the 9th of November 1847, had the effect intended by the act, in procuring from the owners a statement of their claim, and the making an agreement between the parties; but subsequently, this agreement was repudiated by both parties, and the claim abandoned. Under these circumstances, the promoters, finding that no progress was making under the earlier provisions of the act, resorted to the provisions of the 85th section, which, with the aid of the 68th, was calculated to lead to some settlement. But the plaintiffs, by their bill, seek to proceed under the earlier provisions of the act, and call upon the Court to compel the promoters to issue their warrant for a jury. By the 21st section they are only to do this if no claim is made and no agreement come to; but the bill alleges that a claim was made, and an agreement concluded. It cannot be that the notice *per se* gives the Court jurisdiction: if this were so, the jurisdiction would arise as soon as the notice was given; but at that time three modes of proceeding are, under the act, open—agreement, arbitration, and a jury—the latter only in the event of the two former not taking effect. At the time, therefore, of the notice being given, it is uncertain which course will be adopted. And the Court has, therefore, no guide as to what course it ought to enforce. It is only after the time for an agreement or arbitration has expired that the jurisdiction to enforce proceedings before a jury can arise; but that cannot even arise when a valid agreement has been entered into. It appears to me that what has taken place between these parties takes this case out of the principle of the decision in *Walker v. the Eastern Counties Railway Company*, and that the rights of the parties are to be regulated by the 85th section, which, with the aid of the 68th, gives to the owners a short and simple remedy for compelling compensation from the promoters, and that they have this remedy in addition to their right to a mandamus, both being remedies much more

prompt and efficacious, in such a case as this, than a suit in equity, and attended with much less expense. I am, therefore, of opinion that the demurrer ought to have been allowed; and I must reverse the order appealed from.

Demurrer allowed.

M.R. }
July 6, 13. }

FIELD v. LONSDALE.

Claim—Savings Bank—Deposits by one in the Name of another—Constructive Trust.

A brother deposited various sums of money in a savings bank in the name of his sister and himself as a trustee. He kept the depositor's book in his own possession, and drew out small sums as he required them, and made other deposits; he never in his lifetime communicated the circumstances to any one, and died without having made any declaration of trust respecting the money deposited. Upon a claim by the sister,—Held, that no trust was created, the probable intention for opening the account being to evade the provisions of the Savings Bank Act, limiting the amount to be deposited in one name.

This was a claim, by Elizabeth Field, to obtain a declaration that certain deposits in a savings bank, which her brother, Henry Field, had made during his life, were made in trust for her and her sister, Anne Field, deceased. The only evidence produced were certified copies of the books of the savings bank.

It appeared that Henry Field, at his death, had a sum of 68*l.* 18*s.* 8*d.* standing in the name of Elizabeth Field, his sister, and in his own name as a trustee for her. He had also a sum of 173*l.* 4*s.* 9*d.*, consisting of deposits and accumulations, standing in the name of Anne Field, another sister, and of himself as trustee for her.

By his will he gave 550*l.* to the plaintiff, Elizabeth Field, for life, and after her decease to the children of a niece. Joseph Field, the administrator of Anne Field, having died, the plaintiff took out letters of administration to her, and claimed not only the money standing in her own name, but also the money standing in the

name of her sister, on the ground that a trust had been created in their favour. The testator, at the time of his death, had also a sum of money standing in his own name at the savings bank.

By the 9 Geo. 4. c. 92. s. 34. every depositor is to sign a declaration that he has not subscribed to or opened an account with any other savings bank; and if the declaration is untrue the depositor is to forfeit the money deposited. By section 33. any person is authorized, whether a depositor or not, to deposit in the joint names of himself and any other person, in trust for that person, the like sums, and with the like declaration as it would be lawful to deposit and make for himself; and the receipt of the trustee is expressly declared to be, either with or without that of the person on whose account the deposit is made, a good discharge. The act also limited the amount which it is lawful for any one person to deposit to 150*l*.

Upon making the deposit in the name of Anne Field jointly with his own, as a trustee for her, Henry Field signed the required declaration, while at the same time he had the full sum of 150*l*. deposited on his own account in his own name. The deposits in the name of Anne Field were first made in June 1838. She died in 1839, but the testator continued to make deposits upon this account until 1844, when they reached the full amount allowed by the act of parliament. Henry Field, while making these deposits, drew out occasionally upon his own receipt various small sums of money. When the deposits upon Anne Field's account reached the full sum allowed by the act of parliament, Henry Field opened the account in the name of Elizabeth Field and himself, as her trustee; and he continued to make deposits upon that account until his death on the 11th of November 1849, when the facts were for the first time known. The plaintiff now claimed the money which was standing on each account, the one on behalf of herself and the other as the administratrix of her sister.

Mr. Beales, on behalf of the plaintiff.—The acts of the testator have created a trust, and the declaration signed by him when he opened the several accounts de-

termined the character of the account and established the relationship of trustee and *cestui que trust*. The money has been withdrawn from the savings bank by the executor of the testator's will, but he admits assets. The parties are desirous of avoiding a reference to the Master, as no further evidence can be procured.

Wheatley v. Purr, 1 Keen, 551; s. c.

6 Law J. Rep. (N.S.) Chanc. 195.

Smith v. Lyne, 2 You. & C. C.C. 345.

Fletcher v. Fletcher, 4 Hare, 67; s. c.

14 Law J. Rep. (N.S.) Chanc. 66.

Thorpe v. Owen, 5 Beav. 224; s. c.

11 Law J. Rep. (N.S.) Chanc. 129.

Mr. Nevinson, for the executor of the testator.—The mere act of opening an account at the savings bank passed no right either in or to the fund, which could not be withdrawn without the book of deposits, which the testator always retained. He had, therefore, never made any delivery of the fund, but had kept both the legal controul and the legal interest; he had also never made any communication respecting the deposits. The acts of the testator would not allow any trust to be raised by implication, as he had drawn out and applied portions of the money for his own use. The act was voluntary, and the only reason for making the deposits must be found in a desire to evade the statute limiting the amount to be deposited.

Mr. Beales, in reply.

The MASTER OF THE ROLLS.—It seems a singular provision of the legislature to allow deposits to be made in the name of and upon trust for another, and yet to permit the depositor to withdraw the deposits as he pleased. I think that the testator merely desired to avoid the provisions of the statute, and that he had no intention of creating a trust. I must, therefore, dismiss the claim, without costs.

M.R. }
Aug. 6. } ROBERTSON v. SKELTON.

Vendor and Purchaser—Re-sale—Right to complete Purchase.

Upon a petition, asking for leave to re-sell one of two lots in consequence of a pur-

chaser's unwillingness to complete his purchase, it was ascertained that one of the lots, a reversionary interest, had fallen into possession, and that the money had been paid into court, which made the purchase desirable :—Held, as the purchaser had not been discharged, that he was still entitled to complete the purchase ; but the Court imposed terms, and limited the time for payment into court of the balance beyond what had been received for the reversionary interest.

Two houses numbered 4 and 5 in Wellclose Square, and also the reversion in a sum of 500*l.* secured by a mortgage upon lands in the parish of Tickhill in the county of York, and made payable upon the decease of Fanny Metcalfe, were put up for sale by auction in two lots, the reversionary interest in the sum of 500*l.* forming lot 1, and the houses in Wellclose Square forming lot 2. These were purchased by Henry Higinbotham at the sum of 300*l.* for lot 1, and 640*l.* for lot 2, making together 940*l.* In consequence of his not completing his purchase various proceedings were instituted against him—*Robertson v. Skelton* (1). And finally, on the 25th of April 1850, the plaintiff obtained an order to re-sell both the lots.

On the 25th of March 1850, Fanny Metcalfe died, but this was not known when the order for re-sale was made.

On the 29th of June the plaintiff obtained an order under which the trustees of the sum of 500*l.* had paid it into court with interest.

On the 22nd of July this petition was presented by the plaintiff asking that the Master might proceed to sell lot 2.

Mr. Martindale, in support of the petition, referred to *Harding v. Harding* (2).

Mr. Steere, *contra*.—It is quite competent for the Master to sell lot 2. under the former order to sell both lots. This petition, however, discloses an equity which shews that the order of the 25th of April was not proper as the fact of the death of Fanny Metcalfe was not known. The plaintiff still seeks to hold *Mr. Higinbotham* before the Court as a guarantee for payment of the sum of 940*l.* and to

treat him as a surety ; but 500*l.* has already been paid, and *Mr. Higinbotham* is ready to pay the remaining 440*l.* into court, and also the costs of the proceedings against him ; and as no order has been made discharging him as purchaser, he is entitled to do so.

Mr. Martindale replied.

The MASTER OF THE ROLLS.—Certainly he is not discharged, and is entitled still to complete the purchase ; but, under the circumstances, he must pay the 440*l.* into court in three days, and he must pay the costs already incurred.

M.R. }
May 30 ; } PARBURY v. CHADWICK.
June 7. }

Company—Order under the Winding-up Acts, 1848 and 1849—Foreign Railway—Bill subsequently filed—Stay of Proceedings under—Master—His Jurisdiction.

Several persons proposed to establish a company for making a foreign railway, and large sums of money were raised by the sale of scrip, but the scheme failed. An order was made under the 11 & 12 Vict. c. 45. and the 12 & 13 Vict. c. 108. to wind up the affairs of the company. A subscriber afterwards filed a bill for the same purpose, and also to obtain relief against the provisional directors for various improper acts with which he charged them :—Held, though there was a doubt that the case came within the acts of parliament, that the jurisdiction of the Court of Chancery was not interfered with : that the proceedings under the acts of parliament ought to be continued : and that the proceedings by bill ought to be stayed.

This was a motion, on behalf of Solomon Jacob Waley, one of the defendants in the suit, asking that all further proceedings under this bill might be stayed against him.

The bill was filed by George Parbury, on behalf of himself and all other subscribers and scripholders to a projected partnership, called the Madrid and Valencia Railway Company, except the defendants, against the provisional directors of the company. In July 1845, William

(1) *Ante*, p. 140.

(2) 4 Myl. & Cr. 514 ; s. c. 9 Law J. Rep. (n.s.) Chanc. 124.

Chadwick, John Knill, and Solomon Jacob Waley endeavoured to form a company for the construction of a railway from Madrid to Valencia, and they contemplated the formation of a company with divers persons, but with whom in particular the plaintiff was unable to state further than appeared by the bill. The prospectus issued stated, that the capital of the company was to be 2,400,000*l.*, divided into 120,000 shares of 20*l.* each, on which a deposit of 2*l.* per share was to be paid; that two-thirds of the shares were to be disposed of in England, and the remainder in Spain. In England, 53,015 shares were subscribed for, and the deposits paid amounted altogether to the sum of 106,030*l.* In Spain, only 7,257 shares were subscribed for. Difficulties arose in disposing of the remaining shares, in consequence of the general depression of railway property, and especially of foreign projects. A meeting of shareholders was called on the 19th of February 1846, and an account of the affairs of the company was given to the shareholders, shewing the number of shares subscribed for in England, and that there was a balance of 101,835*l.* 10*s.* 1*d.* in hand, after paying 4,194*l.* 9*s.* 11*d.* for expenses; and a resolution was passed, authorizing the directors to take steps for the construction of the railway as soon as the whole of the English and Spanish shares should be subscribed for. The projectors failed to establish any company, and the Spanish directors returned the deposits to the subscribers for shares in Spain, apparently without regard to any of the expenses which had been incurred. The English directors took no steps to settle the affairs of the company, and on the 20th of December 1849, upon the petition of various shareholders, an order was made, by Knight Bruce, V.C., for winding up the affairs of the company under the 11 & 12 Vict. c. 45. and 12 & 13 Vict. c. 108. This order was appealed from, and on the 17th of January 1850 it was brought on before the Lord Chancellor, when, upon an offer, on behalf of the appellants, to pay the respondents the full amount of their deposits and costs, an order was made, that upon the appellants making such payments within a fortnight

after the date of the Master's certificate, stating the amount of the taxed costs, the order made by the Vice Chancellor for winding up the affairs of the company should be discharged (1).

On the 18th of March last, the Master issued his certificate, stating the amount of the costs as taxed by him, but they were not paid in compliance with the order made upon the appeal; and on the 17th of April the bill in this cause was filed.

On the 29th of April last the Master appointed William Quilter to be official manager of the company, and caused an advertisement to be published for shareholders to leave their shares for registry with the official manager. Under this advertisement, the plaintiff, George Parbury, came in, and registered the eighty shares held by him as an original allottee.

The bill stated the facts relating to the formation of the company and its failure, and several proceedings at law against the directors. It charged that the directors had employed improper means to depreciate and buy up the shares of the company for their own personal benefit, and that they had applied the monies of the company in the purchase of such shares and in payment of the costs and expenses of several shareholders, who had commenced legal proceedings against them; that they threatened and intended to apply the funds raised to make an inconsiderable portion of the railway, though the company was never formed; that they had made improvident investments of the funds, and that they had misconducted themselves in such a way that the plaintiff was entitled to require an account from them, and that as the partnership had never been established, and had become impracticable, the affairs ought to be wound up and the accounts taken under the direction of this Court. It also charged that divers of the directors were resident abroad, and that the Spanish directors and also the Spanish subscribers were resident abroad, and that their names and addresses were unknown to the plaintiff. It then made the usual charge respecting the number and fluctuation of the parties, and prayed that it

(1) 1 Hall & Twells, 597; s. c. *ante*, p. 260.

might be declared that the proposed partnership was never constituted, and that the purposes for which it was to be established had failed, and that the directors were not entitled to pay out of the monies received for deposits, or out of the other funds of the company, any costs, charges, and expenses incurred by them after the 19th of February 1846. It also asked for an account of the monies received by the directors, and that in taking the account they might be allowed such sums only as they might have paid in the purchase of shares in the proposed company, and that all the shares and scrip certificates purchased by the directors with the monies of the company might be declared to have been made for the benefit of the present subscribers and scripholders, and that the directors might be ordered to repay all monies improperly applied by them, and that the deposit monies paid by the plaintiff and the other subscribers on whose behalf the plaintiff sued might be repaid to the plaintiff and such other subscribers respectively, subject to a rateable proportion of the expenses properly incurred by the directors prior to the 19th of February 1846. It also asked for the appointment of a receiver, and for an injunction to restrain the directors from applying the funds of the company.

Upon the filing of this bill, Solomon Jacob Waley gave the present notice of motion.

Mr. Lloyd and *Mr. Waley*, in support of the motion.—It is difficult to understand the grounds for filing this bill, as the whole relief asked can be obtained under the order make for winding up the affairs of the company.

Mr. Glasse appeared for other defendants.

Mr. Turner and *Mr. Welford*, for the plaintiff.—The relief asked by the bill is much more extensive than any that can be obtained under the Winding-up Acts. Questions are raised upon this bill which the Master has no jurisdiction to determine; but if he had, the plaintiff is still at liberty to proceed by bill, as the special jurisdiction created by the Winding-up Acts does not exclude the general jurisdiction of this Court. These acts never

intended to take away the legal rights of the shareholders to sue the directors—*The Attorney General v. Aspinall* (2). The assets in question cannot be deemed assets of a company which was never formed, without some previous declaration and decree; and the only assets which could vest in the official manager must consist of money in the hands of the directors. It is impossible for the plaintiff to go before the Master and insist that the shares purchased by the directors belong to the company, neither can he make any declaration to that effect. If so, the most intricate questions of law and fact could be determined by the Master, who could only give directions to the official manager. [The 6th, 51st, 53rd, 58th, 91st, 92nd, and 118th sections of the Winding-up Act were then referred to.] If a declaration of the liabilities of the directors had been obtained, the Master could make calls to satisfy that declaration, but without it no conclusion can be arrived at, as the Master has no jurisdiction to make a declaration, and the liabilities of the directors depend upon that, and not on the acts done.

Mr. Lloyd, in reply.—The order to wind up the affairs of the company includes a direction to the Master to investigate all the questions relating to the company, and where a reference is made under a private act of parliament the Court makes the same provision for the production of deeds, and the examination of parties and witnesses as in the case of a reference in a suit, and a similar order was made in this case.—

Hyde v. Edwards, 1 Hall & Twells, 552; s. c. 1 Mac. & Gor. 410; 12 Beav. 160.

In re the London Dock Company, 11 Beav. 78; s. c. 17 Law J. Rep. (N.S.) Chanc. 111.

THE MASTER OF THE ROLLS.—This case is not without difficulty, or altogether free from doubt, as to the intention of the acts of parliament and as to what ought to be done with the present application. The acts of parliament were intended to give facilities for winding up those concerns

(2) 1 Keen, 513; s. c. 2 Myl. & Cr. 613; 7 Law J. Rep. (N.S.) Chanc. 51.

which it was very difficult, if not impossible, to wind up under the general jurisdiction of the Court by means of a bill in equity; and, as far as I know, this is the first instance in which a plaintiff, having the opportunity of taking advantage of the Winding-up Acts, thinks it preferable to file a bill, subjecting himself to all the difficulties which arise in such cases. The question is, whether he is entitled to do so.

The first objection raised is, that he is seeking by the bill to get relief which he could get under the acts of parliament. He asserts that the directors of this company have laid out money in the purchase of shares, and have used various devices in the purchase of those shares for the purpose of deteriorating the market, and have conducted themselves in such a manner as to get shares of their own at the expense of the company; the object of this bill is, to have it declared, after having it ascertained what they have properly expended, that the surplus belongs to the company. It is said that it is a species of relief which the acts of parliament undoubtedly afford. Having heard all the material clauses which seem to refer to the question, I for a long time doubted whether they would apply to this case. There are various clauses which relate to the contest between the company and strangers, or between strangers and the company. Such is not the case here; but clause 92. has a special relation to matters of internal contest, as this is, for the plaintiff is suing on behalf of himself and all the other shareholders in the company, except those implicated and who are here charged, and upon which the bill prays that relief may be given. This clause seems in words to relate to a case of this kind. It says "The Master shall, subject to such appeal as herein provided, adjudicate upon and determine any matter in contest between contributories or classes of contributories, or between the company and any individual contributories or classes of contributories, which may be necessary or proper to be determined, in order to the complete winding up of the affairs of the company." I do not think it is very accurately expressed, "between the company and any individual contributories or classes of contributories;" but there may be cases in which the dispute is between

those who represent the company at large and those persons with whom the company at large may have a contest. I can very well understand in these cases, where you have a bill on behalf of yourself and all others, you expect by that to escape some of the difficulties; but you must look and see what is the effect of this act of parliament, which provides for the determination and adjudication of those matters "which may be necessary or proper to be determined in order to the complete winding up of the affairs of the company." I think this case comes within the act of parliament: until this question is determined it cannot be found out with the accuracy required what are the assets of the company, and, therefore, you cannot proceed effectually to wind up the affairs of the company. I think, therefore, this is a matter which is within the jurisdiction of the Master to determine; and I am not led to form another opinion because I do not think the Master has the power to declare the rights among these parties. The Court itself has not, according to its practice (which is a subject to be wondered at) the power to declare rights in these matters upon petition; and yet the Court, having formed an opinion as to the rights, will distribute the fund according to that opinion; and there is nothing to prevent the Master, having come to an opinion, from proceeding to wind up the affairs of the company; that opinion being always subject to an appeal to the Court, where any error he may make will meet with due correction. Conceiving that this question might have been brought under the consideration of the Master, I do not think there was any occasion for this bill.

Then it is said, and most truly as a general rule, that you do not take away the jurisdiction of the Court of Chancery by any general words in an act of parliament: but the answer is, that it is not proposed to take away any jurisdiction from the Court of Chancery; and, agreeing with that, the question is, whether that is to be exercised in the mode which is pointed out by this act of parliament, or is the jurisdiction to be exercised as proposed by the plaintiff, upon a bill filed. It was to prevent the evils arising from bills, amounting in some cases to a denial

of justice, as I have heard it called, (and not at all unfairly,) and the inconvenience attending the winding up of a great number of concerns, with an enormous number of shareholders, that this act was passed. It was undoubtedly intended to prevent that great inconvenience and that denial of justice. Then, if it is not necessary for the purpose of obtaining justice, can it be necessary to have the present suit going on, when you may have all the relief wanted in the mode prescribed by the act? Would it not be better for all parties, better even for the plaintiff, who desires to go on by way of bill, that this suit should be stayed?

Being of opinion that this is no attempt to take away any jurisdiction from the Court of Chancery, but merely an attempt to obtain the direction of the Court as to whether the parties having certain rights to be adjudicated upon and determined by the Court of Chancery are to have them determined in the way pointed out by the legislature or not, I am of opinion that the mode pointed out by the legislature is by far the most advantageous for all parties, and that these rights ought not to be sought to be established by bill, if they can be established in any other way, unless the Court, on some special ground, thinks fit to give leave to file a bill.

I am by no means clear that there may not arise cases before the Master (indeed I think it extremely possible) in which questions may occur of such a nature, that they ought not to be determined by the Master in the manner in which he can alone proceed. This act of parliament assumes that it may be the case, and that matters may arise which are not provided for, as it authorizes the Master to make a special report to the Court, that the Court may consider what is to be done. I do not know that cases may not arise (certainly it is possible) in which the Master cannot by the peculiar process prescribed to him by the act, meet the complete justice of the case in the manner in which it ought to be administered between the parties. In such cases, although the act of parliament does prescribe a mode of proceeding, in the form pointed out in the courts of law, it does not say anything about suits in equity. But I am not clear that cases may not arise in which suits may

be very proper, in which the parties may properly institute a suit in equity; but certainly I apprehend if that is done that the Court will take great care that the parties are such only as are interested in the immediate matter in dispute between the parties, and that it will not make them liable to all the objections arising from the absence of other parties in a matter of this kind.

Not at all thinking it is a case free from doubt, my opinion is that there is jurisdiction in the Master to do what is asked here, and that I am bound not to allow this suit to proceed, and therefore I must grant this motion.

Mr. Glasse, on behalf of the defendants, stated that there was another notice of motion, asking that the plaintiff, who was abroad, might give security for costs; but after a short discussion, it was arranged that all further proceedings should be stayed as to the whole of the defendants, without costs.

M. R. } *In re THE NORTHERN COAL*
 July 31; } *MINING COMPANY, ex parte*
 Aug. 1, 2, 6. } *BLAKELEY.*

Company—Partnership Deed—Winding-up Acts, 1848 and 1849—Shareholder deceased—Liability of his Estates—Executor—Title to Shares—Non-compliance with the Requisitions of the Deed.

W. R. B. was holder of 200 shares in a company formed by a deed of settlement, which among others contained provisions that the probate of the will of a deceased shareholder should be registered, and the executors should give notice of the testator's death and execute the deed. W. R. B. died, and by his will appointed E. B. and M. E. B. his executors; they proved his will, and afterwards paid two calls upon the shares, and attended various meetings, to which they were summoned as executors, but they attended no meeting after the payment of the last call. The company afterwards failed, and under an order for winding it up, the Master placed the executors on the list of contributories as "members of the company with qualifications," though it was contended

that they ought not to have been placed upon the list at all; or, if placed on the list then that their liability as executors ought to be restricted to the debts owing by the company at the death of their testator. Upon a notice of motion asking that the liability might be restricted to the debts owing by the company at the death of the testator,—Held, that profits accruing between his death and the transfer of the shares must be paid according to agreement between transferor and transferee; that as the deed declared the shares to be personal estate, they formed part of the testator's assets, and that as no new liability had been created under the provisions of the deed, the testator's estate continued liable, and the motion was refused, with costs.

This was a motion on behalf of Edward Blakeley and Mary Elizabeth Blakeley, that their names, as executors, might be erased from the list of contributories to the Northern Coal Mining Company, or that their liability might be restricted to the debts which were owing by the company at the death of their testator.

William Rix Blakeley was the holder of 200 shares of 25*l.* each in the Northern Coal Mining Company. By his will he appointed Edward Blakeley and Mary Elizabeth Blakeley his executor and executrix, and died on the 2nd of November 1842; in January 1843 his executor and executrix proved his will and paid two calls each of 200*l.* on the shares, the first on the 8th of December 1845, and the other on the 31st of October 1848, which made up the full amount of the shares to 25*l.* each. About four years since the directors purchased the Willington estate, but as the purchase was considered not to be within the scope of their authority, the shareholders were called upon to sign a memorandum either to sanction or to refuse their sanction to such purchase. Forms of each were sent to them, and Edward Blakeley signed the form No. 2. as executor, declining to concur in the purchase. He also attended various meetings of the shareholders, which were convened by circulars, and those sent to E. Blakeley and M. E. Blakeley were all addressed to the executors; but after the payment of the last call he never attended any meeting, though he

attended one between the time it was made and the time it was paid.

The company was formed under a deed of settlement, which was signed by William Rix Blakeley, who for himself, his heirs, executors and administrators, covenanted and agreed with the other shareholders that the company was to continue to subsist for the term of forty years, unless the same was previously dissolved under the powers therein contained, and the property of the company was to be deemed personal estate, the shares of deceased proprietors were to belong to their personal representatives, and there was to be no benefit of survivorship among the other proprietors, the amount of each share was to be paid by the proprietor thereof, his heirs, executors or administrators, when the same should be called by the directors: the registered holder of shares was to be deemed the sole beneficial owner and proprietor thereof, and the company was not bound to notice any trust, charge, or gift by way of legacy, unless the person claiming the legacy or charge should have been duly admitted as a proprietor: and the executors or legatees of a deceased proprietor in respect of the shares held by them in that capacity were not to be deemed proprietors until they should duly be admitted proprietors, and before they could be admitted proprietors they were to be approved of by the board of directors, and were to produce a probate copy of the will under which they claimed: and when executors or legatees were admitted to be proprietors they were to execute the deed, and then, but not before, they were to become proprietors, and were then, but not before, entitled to receive the dividends due in respect of such shares. Transfers of the shares to executors of deceased proprietors were to contain covenants by which they took on themselves all the liabilities which the former proprietors might have been subject to if he had continued to be the proprietor, and on the transfer the liability of the former proprietor was to cease.

Two private acts of parliament were subsequently passed, the 5 & 6 Vict. c. xxi. relating to the management of the company, and the 7 & 8 Vict. c. xxxi. was to enable the company to raise money.

The executors never registered the will of

their testator with the company, neither did they ever give any notice to the company, or execute the deed or comply with its provisions. They also never received any profits.

When before the Master it was submitted that, being executors of a deceased shareholder, and not having complied with the requisition of the deed so as to make themselves shareholders, they could not be made liable to third persons for expenditure subsequent to the decease of their testator, and that as between themselves and the other shareholders, they could not, for the like reasons, be liable to contribute, and that they ought not to be placed on the list of contributories, and have the assets of the testator diminished; but, if put there at all, that it ought to be with a qualification limiting their liability to the time of the death of their testator.

On the 9th of July the Master put them upon the list in Class No. 2 "Members, with qualifications," and the present notice of motion was then given.

Mr. Walpole and *Mr. Craig*, in support of the motion.—The executors have paid the calls made upon them as executors, but they have not complied with the provisions of the deed of partnership, or done any act to substitute themselves for their testator. Edward Blakeley attended the meetings of the company, but by so doing he has not made himself liable as a member. The executors also have no power to join in any trade so as to make the estate of their testator liable for losses. This case is also analogous to banking partnerships under the 7 Geo. 4. c. 46, which restricts the liabilities to three years after a party ceased to be a member.

Fenwick's case, 1 De Gex & Sm. 557; s. c. 18 Law J. Rep. (n.s.) Chanc. 112.

Angas's case, 1 De Gex & Sm. 560.

Armstrong's case, 1 De Gex & Sm. 565.

Ex parte Hall, 1 Hall & Twells, 580; s. c. 1 Mac. & Gor. 307; 3 De Gex & Sm. 80; 18 Law J. Rep. (n.s.) Chanc. 252; *ante*, p. 69.

Ness v. Angas, 3 Exch. Rep. 805; s. c. 18 Law J. Rep. (n.s.) Exch. 470.

Ness v. Armstrong, 18 Law J. Rep. (n.s.) Exch. 473.

Mr. Turner and *Mr. Daniel*, for the official manager.—The company have never been dissolved under the powers for that purpose contained in the deed signed by the testator; the liability which he then incurred continued, and executors of shareholders are within the winding-up acts; still a liability to creditors does not import a liability to partners. The fundamental rules of law may be varied by contract—*Collyer on Partnership*, 384. In this case the stipulation among the members was, that their real and personal estate should be bound for forty years, but the executors claim to have their testator's estate wound up, contrary to the provisions of the deed; that cannot be unless the executors sign the deed or find others to do so. The argument of the executors is, "that the shares ceased to belong to any one at the death of the testator;" but private acts of parliament had been obtained to enable the company to manage their affairs, and the 5 & 6 Vict. c. xxi. continued the liability until a substitute was found. It is a fallacy to say, that this was an attempt to compel the executors to embark their testator in trade: it was the testator himself who had done it. *Hawthorn's case* (1) clearly illustrated the continuing liability of partners; and the cases relating to the 7 Geo. 4. c. 46. did not apply to the present.

Barker v. Buttress, 7 Beav. 134; s. c. 13 Law J. Rep. (n.s.) Chanc. 58.

Thomas's case, 1 De Gex & Sm. 579; s. c. 18 Law J. Rep. (n.s.) Chanc. 249.

Ex parte Gouthwaite, *ante*, p. 393.

Litchfield's case, 3 De Gex & Sm. 141; s. c. *ante*, p. 124

Ex parte Kuper's Assignees, 3 De Gex & Sm. 113; s. c. *ante*, p. 165.

Sanderson's case, 3 De Gex & Sm. 66; s. c. 18 Law J. Rep. (n.s.) Chanc. 248.

Dodgson's case, 3 De Gex & Sm. 85.

Fyler v. Fyler, 2 Rail. Cas. 813, 873; s. c. 11 Law J. Rep. (n.s.) Chanc. 128; 12 Law J. Rep. (n.s.) Chanc. 23.

(1) 1 De Gex & Sm. 571; s. c. 1 Hall & Twells, 225; 1 Mac. & Gor. 49; 18 Law J. Rep. (n.s.) Chanc. 179.

Mr. Walpole, in reply.—The three questions raised are, what is the liability of the executors at law? what is it under the settlement?—and, what under the subsequent acts of the parties? But the law limited liability to the life of the party: without it no shareholder's estate could be made available for his family, and all rights under his will must be defeated or delayed. This must carry with it dissension and its results; such was not the policy of the law. The whole argument rested on the liability under the settlement; but the executors were aware that, unless they complied with the provisions of the deed, the profits would survive to the other partners. Who, then, was liable for any transfer of shares? To some extent, the personal representatives were; but there was no continuing liability unless they entered into the contract, and that question might be determined by a case to a court of law.

August 6.—The MASTER OF THE ROLLS.—The executors contend that the testator's personal liability ceased upon his death, and that therefore his estate is not answerable for any liability arising out of any subsequent transaction. On the other hand, the official manager contends that the testator's estate is bound by his covenants, and is liable to pay all claims properly arising out of the covenants, including, among other claims, the claim to contribute towards payment of all debts incurred by the company at any time. The question depends on the construction which ought to be put upon the deed of settlement by which each party, and therefore the testator for himself, his heirs, executors and administrators, mutually covenanted and agreed with the others. The result of the provisions respecting the liability of a former partner is, that the personal liability of any living proprietor was not to cease until a transfer of his share had been accepted, and the transfer made, and the shares of a deceased proprietor belonged to his executors, and, in a sense, the executors become the owners of the shares; but they are not within the meaning of the deed proprietors of shares personally subject to the liabilities annexed thereto until they had been accepted as transferees, and a transfer

had been made to them, and the executors being, in a sense, warranted by the deed, the owners, although not the proprietors of the shares of a deceased proprietor, are, subject to the approbation of the directors which is made necessary, entitled to require a transfer of the shares to themselves, or a vendee, and may assent to a transfer to a legatee. Now, although it is provided that no one has a right to receive the profits until a transfer of the shares has been made, and a new personal liability has been thereby created, yet I consider it to be clear that if the profits do accrue during the interval between the testator's death and the creation of such liability, such accrued profits must, on the transfer, become payable by the company to the transferor or transferee, as may be agreed between them, and the deed contains no provision directly applicable to the question where the liability, in respect of the shares, rests in the interval between the death of the shareholder and the act by transfer or otherwise, which creates the new personal liability, but so far as the ordinary law of partnership is not altered by the provisions of the deed, I think that the law must be applied to the events which occur in such a case as this.

The shares do not survive, as in ordinary cases; and because they do not survive, but are expressly declared to belong to the personal estate of the deceased proprietor, they must, I think, belong to it or form part of it, subject to the incidents attending the possession of a portion of the capital or assets of the partnership under the management of the directors, as provided for by the deed: and if profits or losses arise, I think that a right to a share of the profits, and with that a liability to contribute a share of the losses, are necessarily incident to the shares themselves or to the right to the shares. It does not appear to me to alter this, that the same shares, or the sums representing the same shares, are at the same time assets of the testator for the purposes of his estate, and assets of the company for the purpose of contribution. It is not otherwise in the case of bankruptcy and other instances.

Many cases of difficulty and of hardship have been mentioned, and are indeed easily supposed and multiplied, and in some cases

many singular results may possibly take place from the provisions of such a deed as this. They must be dealt with as they arise, if provision is not made for them by the parties themselves or by the legislature; but here the single question is, whether on the death of the shareholder there was under the covenants of this deed an end of the liability which he has incurred, and indeed no liability at all until some person is induced to accept the transfer, whereby a new liability is created.

I have read and considered the several cases which were cited in the argument.

I do not find in them any authority to govern the present case, nor any authority against the conclusion to which I have come, from a consideration of the deed and the application of the ordinary law of partnership, where the deed is silent; and on the whole I am of opinion that after the death of the shareholder, until a new personal liability has been created pursuant to the deed, the testator's estate continued liable; and it appears to me the Master has come to a right conclusion, and that the motion must be refused, with costs.

NOTES OF DECISIONS

Made by Sir J. L. Knight Bruce, V.C., on the Orders of the 22nd of April 1850.

The practice of the Court in suits will be adopted in claims filed under the Orders of April 1850, except where a different course is pointed out in such Orders.

May 30. } ROLLING *v.* HARGREAVES.

Claim by a married woman by her next friend.

Mr. Schomberg asked leave, on the part of a married woman by her next friend, to file a claim under the 1st Order. He stated that his difficulty was, that forms in Schedule A. did not apply to such a case.

KNIGHT BRUCE, V.C. held that leave was not required.

June 11. } M'COY *v.* CROSS.

A defendant to a claim residing out of the jurisdiction may be served with a writ of summons by leave of the Court.

Mr. Elderton moved that a defendant residing in Ireland might be served with a writ of summons (Schedule B).

KNIGHT BRUCE, V.C.—As the Court

gives leave to serve subpoenas on defendants to suits residing out of the jurisdiction, I think that the same course ought to be adopted with reference to writs of summons. Leave may be given to serve the defendant at Thurles or elsewhere in Ireland, with a proper or reasonable time for the return.

June 8. } ANONYMOUS.

The Court will not make any order in the absence of the defendant, unless on the production of proper evidence in support of the claim.

This was a claim for the foreclosure of some mortgaged property. The writ of summons had been served on the defendant, and the claim was set down to be heard. The defendant did not appear, either personally or by Counsel. No affidavit or evidence was produced on the part of the plaintiff in support of the claim.

Mr. Collins, for the plaintiff, asked that he might take the order on the ground of the non-appearance of the defendant.

KNIGHT BRUCE, V.C. said that he would not act without the production of proper evidence, or the appearance and consent of the defendant.

May 28. } CARTER v. SMITH.

The 22nd Order as to reviving suits is not applicable to suits instituted before the 22nd of May 1850.

A suit which had been instituted before the 22nd of May 1850 (the time appointed for the Orders of April 1850 to come into operation) became abated after that time.

Mr. R. W. E. Forster applied for leave to file a claim to carry on the proceedings of the suit under the 32nd Order.

KNIGHT BRUCE, V.C. said that he thought that such method of revivor was not applicable to suits instituted before the New Orders, and that a bill of revivor ought to be filed as usual.

COMMON CLAIMS.

The eleven articles in the 1st Order of April 1850, relating to common claims will be construed liberally.

Circumstances not coming strictly within the language of the forms of claims contained in Schedule (A) to the Order of April 1850, may form the subjects of common claims.

May 30. } POWNALL v. DURKIN.

First mortgagee, second mortgagee, and mortgagor.

Mr. Pownall applied, under the 6th Order, for leave to file a special claim by a first mortgagee against a second mortgagee and the mortgagor for foreclosure. He stated that the reason for applying was the doubt which had arisen from the form in the Schedule (A) not being strictly applicable to such a case.

KNIGHT BRUCE, V.C. said, that the case came within the Order as to common claims, and that leave was not necessary.

June 5. } HANSON v. GAMES.

Mortgagee, mortgagor, and judgment creditor of mortgagor.

In a similar application by a mortgagee for leave to file a claim against the mortgagor and a judgment creditor of the mortgagor,—

KNIGHT BRUCE, V.C. said, that where a form in the Schedule (A) did not, in words, meet a case which was within the spirit of the 1st Order relating to common claims, Counsel might alter and adapt it; and that, in this case, leave was not necessary.

June 5. } SMITH v. SMITH.

Bequest of stock to an executor on trust, and claim by the cestuis que trust.

A testator bequeathed a sum of stock to his executors, on trust, for Mr. Smith, for life, with remainder to his children.

Mr. De Gex applied, under the 6th Order, for leave to file a special claim by the children of Mr. Smith against the executors. He stated that a difficulty had arisen from the form No. 2. in the Schedule (A) not being strictly applicable to such a case.

KNIGHT BRUCE, V.C. said, that leave was not necessary, and that a claim might be filed under Article 2. of the 1st Order.

TWO COMMON CLAIMS MAY BE COMBINED IN ONE.

His Honour has also held, that matters forming the subjects of two of the forms of claims in Schedule (A) (as a claim for a legacy and a claim for a share of residue No. 2. and No. 3, or a claim by a second mortgagee for foreclosure of the mortgagor, and a claim for the redemption of the first mortgage No. 6. and No. 7.) might be made the subject of one common claim without special leave.

NEW TRUSTEES—FIRST ORDER—
ARTICLE 11.

The course generally adopted in claims for the appointment of new trustees is as follows:—One of the *cestuis que trust* files a claim, and serves it on all the other *cestuis que trust*; and the order made on this claim is to the effect, that the Master shall inquire who are the parties interested in the trust funds, and whether they are all before the Court; and, if he shall so find, then that he shall proceed to appoint new trustees, and that proper conveyances shall be executed, and that the costs shall be taxed and paid, thereby not rendering any further application to the Court necessary. The taxation of costs, &c. may, if desired, be reserved. If there be any doubt as to the persons interested the order is to the effect, that the Master shall inquire who are the persons interested in the trust funds, and that if he shall find that any persons so interested are not before the Court, such persons shall be

summoned to appear before him, and that when all proper persons shall be before the Court and before him, he shall appoint new trustees, &c.

SPECIAL CLAIMS.

KNIGHT BRUCE, V.C. requires that special claims proposed to be filed under the 6th Order shall be settled and signed by Counsel.

Special claims have been allowed to be filed (among other things) for the following matters, first, by creditors for the administration of the real and personal estate of a debtor deceased; secondly, by a legatee for the arrears of an annuity charged on real and personal estate; thirdly, by a residuary legatee and devisee for the administration of the real and personal estate of a testator; fourthly, to compel an election; fifthly, for a partition.

REPORTS
OF
Cases in Bankruptcy,

BEFORE THE FIRST VICE CHANCELLOR SIR J. L. KNIGHT BRUCE.

BY
BENEDICT LAWRENCE CHAPMAN, Esq.
BARRISTER-AT-LAW.

FROM MICHAELMAS TERM 1849, TO TRINITY TERM 1850,
BOTH INCLUSIVE.



CASES IN BANKRUPTCY

COMMENCING WITH

MICHAELMAS TERM, 13 VICTORIÆ.

1849. { *Ex parte* WALKER (1).
Nov. 8. { *In the matter of the*
 trusts of the Will of
 R. DEBAUPRE.

New Trustees—Jurisdiction to appoint.

The jurisdiction of the Court of Bankruptcy as to the appointment of new trustees in the place of persons having been made bankrupt and the transfer of the trust funds, has been removed to the Court of Chancery by the Bankrupt Law Consolidation Act.

By the 12 & 13 Vict. c. 106. s. 130, it is enacted, that if any bankrupt shall as trustee be entitled, either alone or jointly, to any real or personal estate, it shall be lawful for the Lord Chancellor, on the petition of the person entitled to the produce thereof, on due notice given to all other persons (if any) interested therein, to order the assignees and all persons whose act or consent thereto is necessary to convey, assign, or transfer the said estate, interest, stock, funds, or annuities, to such person as the Lord Chancellor shall think fit, upon the same trusts as the said estate, interest, stock, funds, or annuities were subject to before the bankruptcy.

A testator bequeathed a sum of money to Mr. Nairne and another person on certain trusts, and a sum of stock, in respect

(1) This case and the following one were decided by Sir J. L. Knight Bruce sitting in Chancery, but it has been thought more convenient to include them in the Bankruptcy cases.

of this bequest, was standing in their names. Mr. Nairne was made a bankrupt. This was the petition of some persons interested in the stock under the will, and prayed that Mr. Guyon might be appointed a trustee in the place of Mr. Nairne, and that the stock might be transferred into the joint names of Mr. Guyon and the old trustees. The petition was supported by an affidavit of the fitness of Mr. Guyon to be a trustee.

Mr. Selwyn, for the petition.

SIR J. L. KNIGHT BRUCE asked if the jurisdiction had, since the passing of the New Bankrupt Act, been transferred to the Court of Chancery.

Mr. Selwyn referred to the 130th section.

SIR J. L. KNIGHT BRUCE made the order according to the prayer of the petition.

1850. { *In the matter of the*
Feb. 16, 20. { *trusts of CARTWRIGHT'S*
 Will.

New Trustee—Costs.

A bankrupt appearing on a petition for the appointment of a new trustee in his place, was allowed his costs of appearance out of his estate.

J. Cartwright by his will appointed Mr. Yates to be his sole executor and trustee.

There was no power contained in the will for the appointment of new trustees. Mr. Yates was made a bankrupt. This was a petition presented by the *cestuis que trust* under the will for the appointment of new trustees in the place of Mr. Yates.

Mr. T. S. Clarke, for the petition.

Mr. Southgate, for the bankrupt, asked that he might be allowed his costs of the petition out of the estate.

SIR J. L. KNIGHT BRUCE made the order accordingly.

1849. } *Ex parte* EDMONDS, *in re*
Nov. 24. } EDMONDS.

Adjudication—Value of Assets—Bankrupt Law Consolidation Act, ss. 211, 212, and 223.

The Commissioner may exercise a discretion as to the truth of the affidavit of the form A b. in the schedule to the Bankrupt Law Consolidation Act, referred to in the 212th section, without the matter being brought before him adversely by a creditor.

By the 211th section of the Bankrupt Law Consolidation Act, 1849, it is enacted that any trader, unable to meet his engagements with his creditors, and desirous of laying the state of his affairs before them, may present a petition to the Court, upon which the Court may grant protection, &c. By the 212th section it is enacted that such petition shall be in the form therein mentioned, and that there shall be filed therewith an affidavit in the form contained in the Schedule A b. annexed to the act. By this form the petitioner is to swear "that he hath assets ready to be produced to the Court to the value of 200*l.* and upwards." By the 223rd section it is enacted that if, at any time, it shall be shewn to the satisfaction of the Court, by any creditor, that, &c., or if it shall be shewn that the affidavit filed with the petition was wilfully untrue, so far as concerned the assets ready to be produced by him, it shall be lawful for the Court to adjudge him a bankrupt.

Mr. Edmonds presented a petition and filed an affidavit in the form prescribed by the act. When examined by the Commis-

sioner as to what "the assets ready to be produced by him" consisted of, he stated that he had some property in Belgium and France and also some reversionary interests, which would produce more than 200*l.* The Commissioner, not being satisfied with this statement as to the value, adjudged Mr. Edmonds to be a bankrupt.

This was a petition presented by way of appeal from the Commissioner's decision.

Mr. K. Parker, for the petition, contended, first, that the Commissioner had no discretion as to the question of value, unless it were brought before him adversely by a creditor; and, secondly, that the property mentioned in the affidavit was worth more than 200*l.*

SIR J. L. KNIGHT BRUCE.—It is true that certain acts are mentioned in the 223rd section which are required to be done by a creditor, but this is not one of them. The petitioner made an affidavit in which he explains what are the assets or supposed assets by which he means to support the allegation that he has "assets ready to be produced to the Court to the value of 200*l.* and upwards." These appear to be the proceeds of the sale of certain reversionary rights and interests. It is certainly possible that such sale may produce the amount, but it is merely a possibility. I do not consider that the bankrupt has mentioned any kind of property which comes within the meaning of the expression used in the form prescribed by the act. Therefore, upon the petitioner's own affidavit alone, and upon his own statement merely, it appears to me that the appellant has been well adjudged a bankrupt, and his petition must, therefore, be dismissed.

1849. } *Ex parte* BROWN, *in re* FEN-
July 9. } WICK.*

Proof—Joint-Stock Companies Winding-up Act.

A, a shareholder in a joint-stock banking company directed to be wound up under the Joint-Stock Companies Winding-up Act, 1848, had a call made on him in respect of

* Decided in the sittings after Trinity term, 1849.

his shares, and was shortly after made a bankrupt:—Held, that the official manager had a right to prove for the amount against the estate of A.

Mr. Fenwick held 200 shares in the North of England Joint Stock Banking Company, which had been ordered to be wound up under the Joint-Stock Companies Winding-up Act, 1848, and was put on the list of contributories by the Master in respect of these shares. A call of 4,918*l.* 9*s.* 11*d.* was made on Mr. Fenwick, in respect of these shares, and an order for payment was served on him, in pursuance of the act, on the 4th of January 1849.

On the 24th of January 1849 a fiat issued against Mr. Fenwick.

It appeared that the North of England Joint Stock Banking Company had been indebted to the Central Bank of Scotland in the sum of 11,739*l.* 11*s.* 3*d.*, in respect of which judgment had been obtained, and that the petitioner, Mr. Brown, the manager of the Central Bank of Scotland, had proved for this sum against Mr. Fenwick's estate in the bankruptcy.

The official manager charged with the winding up of the North of England Joint Stock Banking Company tendered a proof against the estate of the bankrupt for the sum of 4,918*l.* 9*s.* 11*d.*, the amount of the call, which proof had been allowed.

This was the petition of Mr. Brown, praying that the proof of the official manager might be expunged.

Mr. Swanston, Mr. F. S. Williams and Mr. Brooksbank, for the petition, referred to the 34th, 50th, 60th, 62nd, 66th, 83rd, 88th and 95th sections of the Joint-Stock Companies Winding-up Act, 1848 (1).

Mr. Bacon and Mr. J. V. Prior, contra, were not called upon.

SIR J. L. KNIGHT BRUCE.—Supposing the statute so often mentioned not to have passed, and all things else to have been as they now are, I assume that it is plain enough that such a proof as the one in question could not have been sustained in any manner or in any form. The question is, whether the statute, whatever anomalies may arise in cases like the pre-

sent, has or has not made a difference; and I think that it has. I am of opinion that the sum was proveable, and, subject to the observations I am about to make, well proved. I have alluded to anomalies, one of which is sufficiently exhibited by the proof of the Central Bank of Scotland for a debt due from the company. It is a difficulty almost inevitable, and, if it should come into practical operation, the Court must deal with it as well as it can. The requisitions of the act must, however, be obeyed, which would not be the case if this demand were held not to be proveable. It has been objected that the leave of the Master was not obtained for this proof, but I collect that this point was not raised before the Commissioner; and I apprehend that I ought to consider the objection as waived, subject to this remark, that I shall think it expedient to be informed now whether the Master approves of the proof.

The solicitor having stated that the Master approved of the course which had been taken,—

SIR J. L. KNIGHT BRUCE ordered that the petition should be dismissed, with costs, without prejudice to any application which might be made by any person to the Master or to the Court.

1849. }
Dec. 5. } *Ex parte WELLS, in re WELLS.*

Certificate—Notice—198th Section of the Bankrupt Law Consolidation Act.

According to the proper construction of the 198th section of the Bankrupt Law Consolidation Act, it is not necessary that the assignees should give notice to the Registrar of their intention to oppose the granting of the certificate to the bankrupt.

On the 17th of August 1849 Mr. Wells was made a bankrupt, and on the 11th of October he passed his last examination. The 7th of November was appointed for hearing his application for his certificate, but the hearing was then adjourned to the 14th. On the 14th of November the bankrupt made an application accordingly, which was opposed by the solicitor for the assign-

nees, and the decision of the Commissioner was, that the certificate should be granted with a suspension of six months from the 14th of November.

No notice was served on the Registrar by the assignees of their intention to oppose the granting of the certificate.

This was the petition of the bankrupt, praying for a declaration that the certificate ought to have been allowed, or that the matter should be referred back to the Commissioner.

The 198th section of the Bankrupt Law Consolidation Act is as follows :—"That forthwith after the bankrupt shall have passed his last examination, the Court shall appoint a public sitting for the allowance of his certificate (whereof and of the purport whereof twenty-one days' notice shall be given in the *London Gazette*, and to the solicitor of the assignees); and, at such sitting, the assignees, or any of the creditors of such bankrupt, who shall have given to the Registrar of the Court three clear days' notice in writing of his intention to oppose, may be heard against the allowance of such certificate; and the Court, having regard to, &c., and whether the allowance of such certificate be opposed by any creditor or not, shall judge of any objection against allowing such certificate, and, either find the bankrupt entitled thereto, or suspend the allowance, &c. as the justice of the case may require."

Mr. Swanston and *Mr. Morris*, for the petitioner.—The opposition of the assignees has been irregular, as no notice was served on the Registrar. By the 198th section the assignees or any creditor is to give notice of "his" intention. Although, certainly, "his" is not, according to grammatical construction, applicable to the assignees, yet the proper construction of the act requires that it should be applied both to the assignees and the creditors. They referred to the 276th section (the interpretation clause) in support of their view.

Mr. Russell, for the assignees, was not called upon.

SIR J. L. KNIGHT BRUCE.—According to the ordinary and proper forms and idiom of the English language, in the construction of the section, the condition or requi-

sition as to giving notice does not apply to the case of an opposition on the part of the assignees. Supposing that observation to be correct, it is not decisive, if the subject-matter and the context of the section should render a departure from this interpretation necessary. But, in this case, the construction which is *prima facie* right, is also right absolutely. It may be said that the bankrupt may be taken by surprise. In that case he may apply to the Commissioner for an adjournment, to give him time to meet the opposition. That was not done here. The case does not suggest that the facts brought to the Commissioner's knowledge did not render the order of suspension right. The bankrupt does not allege that he was taken by surprise, and he did not ask for an adjournment. The petition must be dismissed, with costs.

1849. } *Ex parte* LAWRENCE, in re
Dec. 21. } WHINNERY.

Compromise — Deed of Arrangement — Certificate of Signatures of Creditors — Bankrupt Law Consolidation Act, ss. 224, 225, and 226.

The granting the certificate mentioned in the 225th section of the Bankrupt Law Consolidation Act is a judicial and not merely a ministerial act; and the Court, which has the power of giving such certificate, ought to allow any creditor, who has received notice to attend, to put any relevant questions to the debtor or the inspectors.

By the 224th section of the Bankrupt Law Consolidation Act it is enacted, that every deed of arrangement entered into between a trader and his creditors, signed by six sevenths in number and value of the creditors whose debts amount to 10*l.* and upwards, shall be obligatory on the other creditors. By the 225th section it is enacted, that no such deed of arrangement shall be obligatory on any creditor who shall not have signed it, unless such trader shall obtain from the Court an order or certificate of the Court declaring that such deed has been duly signed by or on behalf of such majority of creditors as aforesaid; and that it shall be lawful for the district

Court to make such order or certificate on the petition of such trader, and to exercise jurisdiction in and over the matters of any such application; and no creditor who shall not have had fourteen days' notice of any intended application for such order or certificate shall be bound thereby. The 226th section provides that the certificate of the inspector appointed by such deed of arrangement shall be *prima facie* evidence that the deed has been signed by such six sevenths of the creditors.

On the 31st of October 1849 Robert Whinnery filed a petition stating a certain deed of arrangement, dated the 1st of October 1849, and stating also that it had been properly signed by such six sevenths of his creditors as mentioned in the act, and praying for the order or certificate mentioned in the 225th section.

Mr. Lawrence, one of the creditors who had not signed the deed, received a notice of the intended application to the Court for such order.

The petition was heard, under the 27th section of the act (in the absence of the Commissioner) by Mr. Lee, the Registrar of the district court. The inspectors named in the deed, Mr. Whinnery, and Mr. Lawrence's solicitor were present at this hearing, and the inspectors gave the certificate mentioned in the 226th section. Mr. Lawrence's solicitor then opposed the prayer of the petition on the grounds that the accounts annexed to the deed were incorrect and that the deed had not been properly signed, and desired that he might examine Mr. Whinnery and the inspectors on these matters. The Registrar said that he considered that he had to act ministerially, and not judicially, and that he could not allow the examination required, or attend to the objections raised, and gave a certificate, dated the 16th of November, in the form mentioned by the 225th section.

A petition was now presented by Mr. Lawrence, praying (among other things) that the order or certificate granted by Mr. Lee might be discharged.

Mr. Swanston and Mr. Shapter, for the petition, contended that it was Mr. Lee's duty to have allowed the examination required by Mr. Lawrence's solicitor, and that he was not justified in giving a certifi-

cate without having heard, and decided on, what was alleged against the petition presented by Mr. Whinnery.

Mr. Bacon, Mr. R. Palmer and Mr. Cairns contended that there was no discretion to be exercised in the matter; and that, at any rate, the point ought first to be brought to the attention of the Commissioner.

SIR J. L. KNIGHT BRUCE.—I apprehend that, according to the true construction of this act of parliament, I am not bound to decline exercising jurisdiction in this case before the matter shall have been brought before the Commissioner personally. So deciding, I think that I ought not to cause the expense or delay that may probably or possibly be occasioned by taking the course of recommitting this point to the personal consideration of the Commissioner. It cannot be a matter of reasonable surprise that a new enactment of this description, whether worded with more or less care, should be viewed by different minds differently; and, with reference to the opinion of Mr. Lee the Registrar in this case, I find myself unable to take the view of it which he appears to have done. The order or certificate which the 225th section authorizes to be made is not, I think, a superfluous or unmeaning act. It was intended to have some operation on the condition of the debtor, and the respective rights of the debtor and creditor, and was not to be done without fourteen days' notice to the creditor. The creditor in this case received notice to attend. He attended and asked that certain relevant questions might be put to the debtor, under the authority, or with the permission, of the Court, and in the presence of the Court, for the purpose of testing the accuracy of the debtor's statement. That permission is declined to be conceded to him on the ground that the order or certificate to be made or granted by the Court was an act purely and merely ministerial. I confess that this is not my view of the case. If I had been in Mr. Lee's place I should have allowed the questions, if relevant, to be put to the debtor. As that is my impression I am bound to act upon it, and to discharge the order or certificate. My order is confined to the discharge of this order or certificate.

1850. }
Feb. 11. } *Ex parte* HICKIN, *in re* ELLINS.

Proof—Partner or Clerk—Salary of Clerk—Bankrupt Law Consolidation Act, s. 168.

*In June 1844, A. entered the service of B. as book-keeper and cashier, and continued as such until December 1848, without coming to any agreement as to the amount of his salary. It was stated by A. that in December 1848 it was agreed between him and B. that the salary should be at the rate of 250*l.* a year, from June 1844, and that the reason that such arrangement was not made before was that B. was engaged in making experiments in a certain manufacture, from which he hoped to derive a considerable fortune, out of which A. expected to be paid. B. became bankrupt in February 1849:—Held, that A. was a clerk and not a partner, and was entitled to prove for his salary.*

By the 168th section of the Bankrupt Law Consolidation Act it is enacted that, when any bankrupt shall have been indebted to any clerk, in respect of the salary of such clerk, it shall be lawful for the Court to order so much as shall be so due, not exceeding three months' salary, and not exceeding 30*l.*, to be paid to such clerk out of the estate of such bankrupt; and such clerk shall be at liberty to prove for any sum exceeding such amount.

A fiat issued against the bankrupt, Mr. Ellins, on the 26th of March 1849. In the bankruptcy, the petitioner, Mr. Hickin, carried in a claim for three months' wages, and 81*l.* 10*s.* for the arrears of a salary alleged to be due to him as the clerk and cashier of the bankrupt. The claim was rejected by the Commissioner. This was a petition by way of appeal from the Commissioner's decision.

The petitioner, in his examination before the Commissioner, made a statement nearly as follows:—"On the 17th of June 1844, the bankrupt engaged me as cashier and book-keeper, but no amount of salary was then fixed to be paid, and I continued from this time until the 10th of December 1848 without any salary having been paid. On the 10th of December 1848, as the bankrupt was preparing a balance-sheet to be laid before his bankers, he requested me

to come to some agreement with him upon the amount of salary that I was to be paid; and it was then arranged between us that, in order that the statement should appear in the balance-sheet, I should receive a salary at the rate of 250*l.* per annum, from the 17th of June 1844. The reasons why I never came to any other arrangement were, that the bankrupt was possessed of a patent for manufacturing salt, and I knew that he was expending large sums of money in bringing such patent to bear, and he led me to suppose that I should participate in his profits, and told me so in November 1845, when he said he should make 100,000*l.* in two years. I expected to be paid out of the profits. For these reasons I did not ask for more money than I actually required for necessaries." In an affidavit in support of this petition, the petitioner made the following statement, by way of explanation of the examination:—"I never did look to the share in the said patent as a remuneration for any services, except for such additional services as were not within the scope of my duty as cashier and book-keeper."

Mr. Glasse, for the petitioner, cited *Ex parte Harris* (1).

Mr. Bagshawe, jun., for the assignees, contended that, under the circumstances above stated, the petitioner was not a clerk, but a partner.

SIR J. L. KNIGHT BRUCE said, that he thought the petitioner's claim, on the evidence, was well founded, and that the case ought to go back to the Commissioner, with a declaration that the petitioner was a clerk.

1850. }
March 18. } *Ex parte* WOODFORD, *in re* WILCOCKS.

Unclaimed Dividends—Interest.

*A. was made a bankrupt in 1810, and in 1812 dividends were declared, amounting altogether to 20*s.* in the pound on the debts proved against his estate, and a release of the surplus of his estate was made to him. The dividends payable to creditors were carried to an account kept by the assignees,*

(1) 1 De Gex, 165; s. c. 14 Law J. Rep. (N.S.) Bankr. 26.

called "the separate account," out of which the creditors were paid. In 1849 a sum of money, consisting of unclaimed dividends and interest allowed on them by the bankers with whom the account was left, was paid over to the official assignee:—Held, that this fund belonged altogether to the creditors who had not been paid.

A fiat in bankruptcy issued against John Wilcocks, Edward Wilcocks, and Alexander Frazer, on the 17th of July 1810. In May 1812 a final dividend was declared, which, with the other dividends before declared, amounted to 20s. in the pound on the debts proved against the joint estate. The joint estate was insufficient to answer these debts. Mr. Frazer had no separate estate to answer the deficiency. Edward Wilcocks's separate estate was insufficient to answer his share of the deficiency by about 100*l.*, and John Wilcocks's separate estate supplied the rest. The assignees, in August 1812, executed a release to John Wilcocks in respect of the surplus of his separate estate.

An account had been opened at the bank of Messrs. Williams & Co. at Exeter by the assignees, in respect of the bankrupts' estate. Two accounts were kept there by the assignees, one called "The General Account," which included all the receipts and payments, and the other "The Separate Account," to which alone the sums applicable to the payment of the dividends declared on the debts proved against the joint estate were carried, and out of which the accountant employed by the assignees paid such of the creditors as applied for payment.

The last payment made to a creditor was in October 1823. At that time there was a sum of 444*l.* standing to the credit of "the separate account," in respect of unclaimed dividends. On this sum interest was allowed from time to time by the bankers, who succeeded to the business carried on by Messrs. Williams & Co., until upwards of 1,000*l.* (including principal and interest) was standing to the credit of this account. In 1849 this sum was paid over to the official assignee of the bankruptcy.

The matter had entirely escaped the recollection of the assignees, so that the

provisions of the 5 & 6 Will. 4. c. 29. ss. 6, 7. (repeated in the Bankrupt Law Consolidation Act, ss. 191, 192,) had not been complied with.

The part of the sum in the hands of the official assignee, which consisted of interest, was about 30s. in the pound on the unclaimed dividends.

The official assignee had paid one debt after his appointment, but without interest.

Mr. Woodford, a creditor who had proved his debt, but had been paid only one dividend on it, applied for the payment of the other dividends due and interest. The claim as to the interest was refused by the Commissioner, and this was a petition by way of appeal from that decision.

Mr. Malins and *Mr. Willcock*, for the petition, contended that the whole fund belonged to the creditors; and cited

Ex parte Renshaw, 4 Deac. & C. 483;
s. c. 3 Law J. Rep. (N.S.) Bankr. 112.

Ex parte Holford, 4 Deac. & C. 798.

Ex parte Jamieson, 3 Mont. & Ayr.
715; and

Green v. Weston, 3 Myl. & Cr. 385;
s. c. 7 Law J. Rep. (N.S.) Chanc. 67.

Mr. Russell and *Mr. Terrell*, for the representatives of John Wilcocks, claimed the fund.

Mr. Follett, for the surviving assignee and the official assignee.

SIR J. L. KNIGHT BRUCE.—In this contention the bankers are quite out of the question, and the money must belong to the creditors entitled to the unclaimed dividends, or to the bankrupts' personal representatives, or to the public, for the assignees may be dismissed from consideration. Any claim by the public, under the statute, I consider to be clearly invalid, and service on the Attorney General is unnecessary. This reduces the matter to a question between the creditors and the bankrupts' representatives, and, the assignees having kept two distinct accounts, one of which was clearly identified as comprising solely the sums due to the creditors, I am of opinion that it must be taken to have been their exclusive property, and I shall so treat it. Probably, had the cases now cited been brought to the attention of the learned Commissioner he would have

come to the same conclusion. The costs of all parties must be paid out of the aggregate fund.

1850. } *Ex parte* CHAMBERLAYNE, *in re*
April 17. } WEST.

Solicitor—Petitioning Creditor—Trustee—Costs.

A, a solicitor, was the petitioning creditor in a bankruptcy, and acted as solicitor in the matter:—Held, that he was entitled to the payment of his bill in full, and not merely to the costs out of pocket.

Mr. Chamberlayne was the petitioning creditor in this bankruptcy, and, being a solicitor, acted as the solicitor in the matter.

By the 114th section of the Bankrupt Law Consolidation Act, it is enacted that the petitioning creditor shall, at his own costs, file and prosecute his petition until the choice of assignees by the creditors; and the Court shall, at or after the sitting for such choice, make order for the payment thereof out of the estate of the bankrupt, &c.

Mr. Chamberlayne brought in his bill as petitioning creditor, which the Commissioner taxed on the same principle as if he had been a trustee, merely allowing him his costs out of pocket.

This was a petition, by way of appeal from the decision of the Commissioner, as to the principle on which the bill ought to have been taxed.

Mr. Hare, for the petitioner, contended that the petitioner was entitled to the payment of his bill in full.

Mr. Eddis, for the assignees, supported the decision of the Commissioner, and said that such was the practice in bankruptcy.

SIR J. L. KNIGHT BRUCE.—I have heard nothing against the propriety of the fiat or of the conduct of the gentleman who was the petitioning creditor. Had such an objection been alleged on sufficient grounds, I might, perhaps, have considered that this would have made a difference. If I were at liberty to decide the case independently of practice, I should consider that the analogy of an attorney, a plaintiff

in his own right, and acting for himself professionally, should be followed rather than the analogy of an attorney, a trustee, acting for himself, which is the position assumed by the Counsel for the respondents. In this view I should allow the costs. But it has been stated that there is a practice as to such costs, and I should wish the Registrar to make inquiries on the subject. If it shall appear that there is any such practice, I cannot act in contradiction to it.

The order was afterwards made in favour of the appellant, by which he was allowed the payment of his bill in full.

1850. } *Ex parte* FLEET, *in re* JARDINE.
Aug. 2. }

Payments in Priority—Savings Banks—Money received by Virtue of an Employment.

A. was appointed to be the actuary and cashier of a savings bank. By one of the rules of the savings bank, it was declared that the bank should be open for receiving deposits every Saturday from eleven till two, at the house of A, when the committee or some of them would attend to receive deposits and pay money out. None of the committee ever attended. A. received the deposits without controul, and, at the time of his bankruptcy, was a defaulter in respect thereof to a considerable amount:—Held, that A. did not receive the deposits by virtue of his office, and that the amount due from him was not payable out of his estate in priority to his other debts.

The Dartford Savings Bank was established in 1816, and Mr. Jardine was then appointed to be the "actuary and cashier," and continued to be such until the time of his bankruptcy. The twelfth of the Dartford Savings Bank rules is as follows.—

"That the bank shall be open for receiving deposits of not less than one shilling at a time (subject to the restrictions hereinafter contained) on Saturday in every week, from the hour of eleven o'clock in the forenoon to one o'clock in the afternoon, or at such other hours as shall from time to time be thought convenient by the managers, at the house of Mr. Jardine in

Dartford, or at such other convenient place as shall be appointed by the officers and committee, of which due notice shall be given, *when the committee, or some, or one or more of them, according to a rota to be settled between them, shall attend to receive deposits and pay money out.*"

This rule was never observed, so far as related to the attendance of the committee or any of them, and Mr. Jardine, who kept a draper's shop at Dartford, received all the deposits without any controul; but, although he entered all the sums so received in the books of the depositors, he did not regularly enter them in the cash book of the savings bank, and, at the time of his bankruptcy, was a defaulter in respect of deposits received by him to the amount of 2,206*l.*

Mr. Jardine had given a bond, as required by the 9 Geo. 4. c. 92. s. 7.

By the 3 & 4 Will. 4. c. 14. s. 28, it is enacted, "that, if any person appointed to any office in a savings bank and having in his hands or possession, *by virtue of his said office or employment*, any monies belonging to such savings bank, shall become bankrupt, his assignees shall pay out of his assets all such sums before any other of his debts are paid."

This was a petition presented by two of the trustees of the Dartford Savings Bank, by way of appeal from the decision of the Commissioner. The petition stated the above circumstances, and contained the following statement:—

"That it was the duty of the said bankrupt, as such actuary and cashier, to receive from the depositors, and to enter into their books, all sums of money which they brought to deposit; and that the said bankrupt did from time to time receive such monies accordingly, and upon the receipt thereof entered the amounts thereof respectively in the books of the several depositors; and that it was also the duty of the said bankrupt to enter into the cash book kept by him, as such cashier, the sums so received from each depositor, but the said bankrupt nevertheless from time to time, while he was, and acted as, such actuary and cashier to the said savings bank as aforesaid, had, and retained in his hands, divers sums of money received by him, by virtue of his said office or employ-

ment, from sundry depositors, and did not make any entry of the receipt of such monies in the cash book of the said savings bank."

The petition prayed that the sum of 2,206*l.* might be paid before the other debts of the bankrupt.

Mr. Russell and Mr. Tripp, for the petition, contended that the bankrupt had received the deposits by virtue of his office or employment, and that the case came within the letter of the act, or, if not within the letter, at any rate, within the spirit of it.—They referred to the 7 & 8 Vict. c. 83. s. 4, whereby it is enacted that "if any actuary, cashier, secretary, officer, or other person holding any situation or appointment in any savings bank shall receive any sum or sums of money from, or on account of, any depositor, or person desirous of becoming such, or on account of such institution, and shall not at the next day on which the said institution is opened for the receipt of deposits account for and pay over the same to the trustees or managers thereof, or to such person as may be directed by the rules of the institution, such actuary, cashier, secretary, officer, or other person as aforesaid, on being convicted thereof, shall be guilty of a misdemeanour;" and cited *Ex parte Ross* (1), and *Ex parte Riddle* (2).

Mr. Bacon and Mr. C. Barber, for the assignees, were not called upon.

SIR J. L. KNIGHT BRUCE.—I am unable to feel any difficulty upon this case, which is a claim against common right, and must be construed strictly. Fortunately for some persons, the question who ought to pay these unfortunate depositors is not before the Court. I am not convinced by what has been adduced that the estate of the bankrupt ought to be made to pay in full the demand which is now urged against it. [His Honour here stated the 28th section of the 3 & 4 Will. 4. c. 28.]—Here the bankrupt had money in his hands, and, in this sense, became a debtor to some person or persons by receiving money which belonged to a savings bank. Was it his duty in his official capacity to receive money? He was

(1) 6 Ves. 802.

(2) 3 Mont. D. & D. 80; s. c. 12 Law J. Rep. (N.S.) Bankr. 19.

an actuary—in other words, a sort of calculator and book-keeper; but I do not consider that it was his duty to receive money.—[His Honour then read the 12th rule of the Dartford Savings Bank.]—As I understand, the committee, although they had contracted to fulfil those duties, did not, nor did any of them, attend, according to a rota, to perform them. They either abandoned their duty altogether, or delegated it to another, whom they left wholly untroubled, and who, like servants who have careless masters, became a dishonest man, which might not have been the case if the duties undertaken by them had been performed by them. The bankrupt may have received the money as the agent or servant of some person or persons, but he did not receive it officially, as a servant of the institution. I am, therefore, of opinion that the claim against the estate by the trustees is not established.

The petition must be dismissed with costs.

1850. } *Ex parte* GORDON, *in re*
Aug. 2. } GORDON.

Surrender—Discretion of Commissioner.

The Court refused to interfere with the discretion of the Commissioner as to not allowing liberty to the bankrupt to surrender.

Mr. Gordon, the bankrupt in this case, applied to the Commissioner for leave to surrender, which the Commissioner refused. This was a motion by way of appeal from his decision.

Mr. Gordon stated, in his affidavit, that he was a lithographer; that he had left this country for America in May 1849; that a fiat in bankruptcy had issued against him in the June following; that, when he first heard of the fiat, he had only a few shillings in his possession, and was totally without means of coming to England; that he had, by his earnings as a lithographer in America, at length saved money enough to pay for his passage; that he had started

as soon as he could from America, and had arrived in England in July 1850; and that the Commissioner had then refused to accept his surrender. He stated that one ground of the refusal of the Commissioner was his belief that he (the bankrupt) had, shortly before he left England, borrowed 260*l.* on a bill of sale on his furniture and effects, and gone off with that sum. He admitted the borrowing the money, but said that the greater part of it had been paid directly after to his creditors.

Mr. Duncan, for the motion.

Mr. Eddis, for the assignees, said, that the assignees had opposed the liberty for the surrender, and that the Commissioner had consented to their opposition, on the ground that the bankrupt's conduct had been very reprehensible—particularly as to the matter of the borrowing the 260*l.*

Mr. Duncan, in reply, contended that, on the assumption that the charges against the bankrupt were all true, they had nothing to do with the question of his surrender. The only matter that was at all pertinent on the motion was the conduct of the bankrupt *after the fiat had issued*. The bankrupt's case in this respect is, that he was in a foreign country, without means, when he first heard of his bankruptcy, and that he had come over to England as soon as he could. This was not attempted to be denied.

SIR J. L. KNIGHT BRUCE, said, that if an indictment was threatened, he might annul the fiat. Reserving this to himself, he should be reluctant to interfere with the discretion of the Commissioner on such a point. At the same time he did not see what good it would do to anybody that such liberty of surrender should be refused, and suggested some arrangement.

It was ultimately arranged between the Counsel for the bankrupt and the assignees, that the bankrupt should pay the costs of the applications to the Commissioner and to the Vice Chancellor, and that he should be at liberty to surrender.

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TO THE SUBJECTS OF THE

CASES IN CHANCERY AND BANKRUPTCY,

IN THE

LAW JOURNAL REPORTS,

VOL. XXVIII.—XIX. NEW SERIES.

CHANCERY.

Account—Bill being filed by corporation of Berwick against treasurer of borough fund and three persons, his sureties, for obtaining an account of monies paid to the treasurer, defence of treasurer was, that he having been proceeded against before Magistrates, plaintiffs' claims could not now be enforced by a court of equity; defence of two of sureties was, that corporation by their act only empowered to appoint a treasurer from year to year, and as he had been continued beyond first year, without a renewal of bond of sureties, they were no longer liable; defence of third surety was, that he, having given notice he would no longer continue surety, was therefore exonerated though no deed had been executed by the corporation to exonerate him. The treasurer having taken upon himself a fiduciary trust, court of equity bound to enforce due performance of it; and bond to which sureties were parties containing a clause extending their liability to any annual or other future election of treasurer, that liability still remained; and no deed having been actually executed to exonerate third surety he also remained liable. In such case sureties necessary parties to the suit. *Mayor, &c. of Berwick-upon-Tweed v. Murray*, 281

— If accounts are directed to be kept, with regard to future events (which subsequently happen) on case not raised by pleadings, and distinct from points to be decided by decree, it is in discretion of Court to hear a motion for such reference before, or to postpone it until, the hearing of the cause. Motion of plaintiffs respecting their costs of proceedings at law, ordered to stand over, without prejudice to question of costs of motion, until report had been made, upon grounds that costs of such proceedings might be affected by result of reference. *Rigby v. Great Western Railway*, 470

Accumulation—Testator devised estate to trustees upon trust to settle same to use of such trustees for 2,000 years, and declared trusts of term to be, in trust to pay to any child who, under limitations therein declared, should for time being be entitled to possession or rents of his estate, and, who, having attained twenty-one, should be under twenty-five years of age, an annual sum of 500*l.*

until he should attain twenty-five or die under that age, and in next place in trust to receive surplus as well during minority of every person so for time being entitled as during such time as any such person should be under twenty-five years, and to accumulate same, and at end of every or any such period of accumulation to apply funds so accumulated towards payment of his debts and legacies. Trust for accumulation exceeded boundary of legal limits, and void. *Scarbrick v. Skelmersdale*, 128

— Gifts for younger children of tenant for life, not born at date of settlement, are portions within the meaning of 2nd section of Thellusson Act. *Beech v. St. Vincent*, 130

— See Ecclesiastical Corporation.

Acquiescence—Case in which a party held to have barred himself from asserting title by making no claim for eighteen months after his exclusion, during all which time he had permitted B. to carry on an undertaking at his own cost and risk. Bill dismissed, with costs, except so far as the same were increased by defendant setting up Statute of Frauds or denying parol agreement or part performance thereof. *Cowell v. Watts*, 455

— See Arbitration. Company. Railway. Trust and Trustee.

Administration of Estate—Motion by plaintiff in creditors' suit, after decree, to restrain proceedings of other creditors in other suits. Practice as to payment to creditors to be restrained, of their costs of proceedings and motion. *West v. Swinburne*, 81

— If pecuniary legacy is given to legatee in such terms as to leave construction of will in that respect doubtful, it is irregular to make legatee a party to suit for administration of estate of testator. *Crackenthorp v. Jouning*, 133

— Good-will of profession of surgeon dentist being sold by his widow, his executrix, for 500*l.*, the whole or part of that sum belonged to testator's estate. *Smale v. Graves*, 157

— In administering a testator's estate, a debt being found to be due from his estate, in respect of a dishonoured bill of exchange, and nine years' interest on it; and it appearing to be the practice in Masters' offices to deduct income tax in respect of

- such interest, the Court refused to disturb that practice. *Dinning v. Henderson*, 273
- Administration of Estate** (continued)—A sum of 27l. for wages due to servants of testator at his death, and another sum of 16l. for keeping house for repairs of which testator's estate liable, allowed to executor in passing his accounts (under circumstances of case) on his own affidavit and without vouchers. *Caton v. Rideout*, 408
- Trustees who file bill for administration of testator's estate are entitled to their costs, however small the estate may be, and however small the risk in administering it. *Hodgkinson v. Gilbert*, 424
- If a decree for general administration of an estate has been made, and the Court upon that ground restrains proceedings in another (a creditors') suit, question of payment of costs of plaintiff in such creditors' suit will be reserved, if debt be disputed by executors. *West v. Swinburne* explained. *Davey v. Pleslow*, 491
- See Executor. Staying Proceedings.
- Adverse Possession.** See Charity.
- Affidavits.** See Evidence.
- Amendment**—Two suits having been instituted by two different next friends on behalf of an infant, order of reference made in both suits as to which was most for benefit of infant. Subsequently to date of order, but before it was executed, demurrer put in to one suit and submitted to, and bill substantially amended. Amendment not preclude Master from proceeding with order of reference. Under such order Master is to report as to the "suit," and therefore bound to refer both to original bill and amended bill (if any) as evidence of object and scope of suit. No ground of appeal that Court below has reserved question of costs, which might have been properly disposed of at the hearing. *Goodale v. Gawthorne*, 447
- Special orders to amend must be obtained upon affidavit of plaintiff and solicitor. On obtaining special order to amend, it is not necessary that affidavit mentioned in 68th General Order of May 1845, should state all the amendments to be made in bill. *Payne v. Little*, 459
- See Priority.
- Annuity**—Bequest of chattel leasehold house to trustees, on trust to pay to A. annuity for her life, and after A.'s death to be possessed of it on certain trusts. The house being taken by railway company, and purchase-money paid into court, A. entitled to have corpus of fund broken in upon for obtaining payment of arrears, and payment in future of the annuity in full. *Re London, Brighton &c. Railway, ex parte Wilkinson*, 257
- Answer**—Demurrer to bill being overruled at the hearing, and Court having given defendant a month's time to answer, Master has no jurisdiction to give further time. *Baig v. Gray*, 344
- See Discovery. Practice.
- Appeal.** See Amendment. Trust and Trustee.
- Apportionment.** See Public Improvements. Will.
- Arbitration**—A. and B. having referred matter in dispute between them to arbitration of C, and C. having made his award; upon bill by A. against B. and C. to set aside award on equitable grounds, but without proving against C. corruption, partiality, or fraudulent or unfair conduct, C. improperly made a party to the suit. A. and B. having referred a matter in dispute between them to arbitration of C, a meeting took place on 22nd of June for purpose of carrying out the business of the award, at which A. was present part of the time. On the 23rd, B. had an interview alone with C. on the business of the award, without knowledge or assent of A. C. made his award. Upon bill by A. to set aside award on ground of the meeting on 22nd, Court held, that under circumstances appearing in evidence, A. ought to have been taken to have acquiesced in interview on 23rd, and sustained the award. Whether the award could have been sustained in the absence of the implied acquiescence of A., *quære*. *Hamilton v. Banks*, 307
- Arrest**—Voluntary discharge of party irregularly arrested does not prejudice the right to enforce the demand by same process or by new writ. *Andrewes v. Walton*, 249
- Party arrested on writ of attachment for non-payment of costs, discharged out of custody by consent, on ground of privilege at time of arrest. Issuing of subsequent writ of attachment for same costs, and arrest thereunder, regular. *Ibid.*
- Attachment.** See Arrest. Baron and Feme.
- Attorney General**—Costs of. See Discovery.
- Bankruptcy**—Jurisdiction of Court of Bankruptcy, as to appointment of new trustees in place of persons made bankrupt and transfer of trust funds, removed to Court of Chancery by Bankrupt Law Consolidation Act. *Ex parte Walker*, 406, Bankr. 3
- Bankrupt appearing on petition for appointment of new trustee in his place allowed his costs of appearance out of his estate. *In re Cartwright*, 406, Bankr. 3
- Baron and Feme**—Testator bequeathed 10,000l. to husband and wife, to be put in their joint names and that of his executor, husband and wife to enjoy interest during joint lives, or life of survivor. Fund paid into court to credit of cause, "the husband and wife, their stock account." Dividends un-received at death of husband belonged to wife by survivorship. *Laprimaudaye v. Teissier*, 16
- Husband's right to wife's personal estate, where both domiciled in Scotland. Right of husband to elect to take freeholds in England when vested in trustees for sale. Fact of parties electing, to be recited in decree. *Hitchcock v. Clendinning*, 238
- Order made for an attachment against a married woman for not answering in a suit affecting her separate estate, she having obtained an order to answer separate from her husband. *Taylor v. Taylor*, 304
- See Company.
- Bill**—Dismissal of. See Practice.
- See Railway. Scandal and Impertinence. Supplemental Bill.
- Bill of Revivor**—Suit having abated after decree, by marriage of one of several co-plaintiffs unknown to their solicitor in the cause, and not being revived until proceedings had been subsequently had under the decree, upon application of plaintiffs, Court declared that they were entitled to same benefit of proceedings since abatement as they would have been if suit had been immediately revived, and ordered suit and proceedings to be carried on accordingly. *Johnson v. Johnson*, 371
- See Trust and Trustee.
- Charge**—Parties precluded insisting on prior equity by their conduct in not disclosing such prior equity and in doing acts which apparently negatived its existence, after notice of equitable incumbrance; and injunction to restrain incumbrancers suing at law dissolved on appeal. *Mangles v. Dixon*, 240
- Charity**—Testator, by will, in 1624, gave certain funds to corporation of R. upon trust for poor of town of R, with proviso that in case of neglect to perform trusts or of mis-employment of funds, same should be paid or transferred to corporation of L, for benefit of Christ's Hospital. In 1639, on information by Attorney General against corporations of R. and L, decree made for application of funds, varying trusts declared by will, with decla-

ration that if corporation of R. should misapply funds, contrary to decree, same should be made over to corporation of L, for benefit of Christ's Hospital. Corporation of R. misemployed funds for series of years; and on bill by corporation of L. against corporation of R. and Attorney General for transfer of fund, held, affirming decree below, that the limitation over took effect. Such limitation over not within rules of law against perpetuities, being substitution merely of one charity trust for another. Property having continued in possession of corporation of R, who, after acts of forfeiture, became trustees for Christ's Hospital, there was no adverse possession, and Statute of Limitations not apply. *Christ's Hospital v. Grain-ger*, 33

— By letters patent Bishop of Lincoln for time being directed from time to time to examine and inquire into ancient statutes, laws, and ordinances of a certain charity, and abolish such as were repugnant to the laws, and make such other good and salutary laws and ordinances, as well concerning divine services as concerning government and direction of warden, confrater, and poor to be supported in hospital, as should appear to said bishop good, useful, fit and salutary, so long as they should not be inconsistent with laws of realm or statutes of founder. Bishop of Lincoln not entitled to visitatorial powers, and could exercise no controul over revenues of hospital, which were subject to jurisdiction of Court of Chancery. *Attorney General v. Brown's Hospital*, 73

— Act of parliament having provided for application of surplus funds of charity, but mode of application becoming inexpedient or useless, Court has jurisdiction upon petition of trustees under Sir S. Romilly's Act, to direct inquiry before Master as to expediency of applying for another act of Parliament to authorize different mode of application. *Re Shrewsbury School*, 287

— Testatrix by will directs her executors to pay 100*l.* a year to her bankers for sole use and benefit of any ministers and members of churches then forming upon the apostolical doctrines brought forward originally by the late Edward Irving, who might be persecuted, aggrieved, or in poverty for preaching or upholding those doctrines; or half the sum may be appropriated for benefit of church founded by the late Edward Irving in Newman Street. This a valid charitable bequest to a class ascertained by the Master. Defendant, administratrix and residuary legatee of testatrix, admitted assets, and had set apart a fund to secure payment of above bequest. The suit being merely for determination of validity of bequest, the setting apart from general estate a sufficient fund to meet bequest, did not constitute such a severance as to exonerate residuary estate of testatrix from payment of costs of suit, and such costs properly payable out of such residuary estate. *Attorney General v. Lawes*, 300

— See Will.

Church—A chapel or meeting-house in England was vested in trustees, upon trust for congregation of Protestant Presbyterian dissenters, proved to be in as strict a connexion with Established Church of Scotland as practicable. This not a trust for dissenters generally, and no person entitled to hold office of minister of chapel whose opinions and acts constituted disqualification for ministry of Established Church of Scotland; and congregation entitled to declaration, as prayed, that their minister must be minister of that church, although foundation deeds contained no declaration to that effect. Officiating minister of chapel who had adhered to

Free Church of Scotland, and become disqualified for ministry of Established Church of Scotland, and those of trustees, defendants, who concurred and co-operated with him in opposing relators and plaintiffs, ordered to pay costs of suit, and adverse defendants to be removed from office of trustees.

Attorney General v. Murdoch, 3

Claims—A brother deposited various sums of money in a savings bank in the name of his sister and himself, as a trustee. He kept depositor's book in his own possession, and drew out small sums as he required them, and made other deposits, and never in his lifetime communicated circumstances to any one, and died without having made any declaration of trust respecting money deposited. Upon claim by sister, no trust created, probable intention for opening account being to evade provisions of Savings Bank Act, limiting amount to be deposited in one name. *Field v. Lonsdale*, 560

— The practice of the Court in suits will be adopted in claims filed under the Orders of April 1850, except where a different course is pointed out in such orders, 570

Special leave not necessary to file claims—

by married woman by a next friend, *Rolling v. Hargreaves*, 570

by first mortgagee against second mortgage and mortgagor for foreclosure, *Pownall v. Durkin*, 571

by mortgagee against mortgagor and judgment creditor. *Hanson v. Games*, 571

by children interested in trust fund after death of tenant for life. *Smith v. Smith*, 571

or for filing one claim combining the subject-matter of two common claims, 571

The eleven articles in the 1st Order of April 1850 relating to common claims will be construed liberally, 571

Circumstances not coming strictly within the language of the forms of claims contained in schedule A. to the orders of April 1850 may form the subject of common claims, 571

Special claims must be settled and signed by council, 572

Such claims have been allowed for the following purposes:—

1. by creditors for administration of real and personal estate of a debtor deceased,
2. by legatee for arrears of annuity charged on real and personal estate,
3. by residuary legatee and devisee for the administration of real and personal estate of a testator,
4. to compel an election,
5. for a partition, 572

Where claim filed, defendant out of jurisdiction may be served with writ of summons by leave of Court. *M'Coy v. Cross*, 570

— In default of appearance of a defendant to a claim evidence must be adduced in support of it. Anonymous, 570

— An abated suit cannot be revived by claim, but only by bill of revivor. *Carter v. Smith*, 571

— See Practice.

Company—Directors of company formed for manufacture of glass, entered into contract to purchase licence to use patent for certain improvements in making glass, and constituted themselves trustees for company. Purchase subsequently sanctioned by general meeting of shareholders. Company by reason of their having sanctioned contract, bound to indemnify directors against their liabilities in respect of purchase. *Gleadow v. Hull Glass Company*, 44

— A, in right of deceased husband, entitled to six

- shares in joint-stock banking company, and on her second marriage assigned by deed all her interest in shares to B, in trust for her separate use. B. gave verbal notice to clerk of company of execution of deed, but no transfer of shares ever required by or made to him. B. for some years, received dividends and signed dividend warrants as "agent of A." Memorandum of assignment made in books of company without privity of B; but his name never returned to Stamp Office as shareholder until stoppage of bank. B. not a contributory within Joint-Stock Companies Winding-up Act; but leave given to try question in action at law. *Re North of England Company, ex parte Hall*, 69
- Company (continued)—Interim manager appointed after company ordered to be wound up, must be served with petition to discharge that order. *Re Grand Cambrian Junction Railway*, 122
- After decision by Vice Chancellor of appeal from decision of Master under Winding-up Act, 1848, and appeal refused by Lord Chancellor, on ground of notice of motion having been given more than three weeks after decision of Vice Chancellor, and that 33rd section of 12 & 13 Vict. c. 108, limiting time within which notice of motion for rehearing must be given, applies to orders made under Winding-up Act, 1848, motion before same Vice Chancellor to rehear original motion, refused. *Re North of England Company, ex parte Sanderson*, 122
- Shares of 1*l.* each in company deposited with A, by way of security for money due to him. A. having received notice that, by resolution of company, every ten shares of 1*l.* each had been converted into one share of 10*l.*, brought shares to company's office and received back new shares in exchange. A. liable as contributory. *Re Patent Elastic Pavement Company*, 123
- A party entitled to shares in steam-packet company, transferred them to his son, then a minor. Deed of settlement provided that minors might vote by guardians. It was admitted that son had taken free passages as proprietor, and that in tickets given him for that purpose, he was described as "Master L." On coming of age, having done no act of acceptance of shares after his majority, he repudiated them. Father liable as contributory. *Re St. George's Steam-Packet Company, ex parte Litchfield*, 124
- Under order for winding up affairs of company under Winding-up Act, 1848, certain costs were occasioned to alleged contributories, in attending a meeting before Master inoperative by previous default of official manager. Neither Master nor Court has jurisdiction to order official manager personally to pay such contributories costs of attendance. *Re Cambridge and Colchester Railway, ex parte Marsh*, 161
- Petition presented to wind up railway company, incorporated by act of Parliament. By subsequent enactment such companies excepted out of provisions of Winding-up Act, under which petition presented. Petition dismissed, without costs. *Re Direct London and Portsmouth Railway*, 163
- Petitioner for winding up company resident out of jurisdiction, liable to give security for costs, as in case of plaintiff in suit resident out of jurisdiction. *Re Royal Bank of Australia*, 163
- Master charged with winding up of company not authorized to make orders on particular individuals for production of papers, &c. *ex parte* or without notice. *Re Warwick and Worcester Railway, ex parte Pell*, 164
- A bankrupt at time of bankruptcy held shares in company afterwards ordered to be wound up. Assignees rightly placed in list of contributories, with addition of words "as assignees." *Re Kellman's Railway Locomotive Improvement Company, ex parte Kuper*, 165
- Shares allotted to A. who paid call and deposits. Deed of settlement dated after such payment made contained clause that, if shareholder neglected or refused to execute it before a certain day, it should be in power of directors to forfeit his shares. A. did not execute deed, and shares declared to be forfeited. A. not a contributory. *Ibid. ex parte Beresford*, 166
- Power of Master charged with winding up company to direct substituted service to be made of any order under act. *Ibid. ex parte Ellis*, 166
- In 1845 company projected, and A. became shareholder. Shortly afterwards money was paid to A. on behalf of company. Company ordered to be wound up, and A. placed in list of contributories. In Master's office official manager claimed, as debt due to company from A. the sum paid him in 1845. Master reported this sum and interest due from A. as a member and contributory, and ordered him to pay it. Sum, if due from A., not due from him as contributory, and Master's report discharged, &c. *Re Triang Railway, ex parte Cox*, 167
- Master charged with winding up of company declined on two several occasions to insert name of J. P. as contributory either on his own account or in his representative character; and Vice Chancellor, on two distinct appeals, confirmed decisions of Master. Motion before Lord Chancellor to discharge or vary orders of Vice Chancellor, and that J. P. be included in list of contributories, as contributory, either in his own right or as personal representative, in respect of certain shares, and either for whole in one character, or for part in one character and part in another, not an appeal motion within provisions of Winding-up Act, 1848. *Re St. George's Steam-Packet Company, ex parte Pimm*, 233
- Usual order for dissolving and winding up company made upon petition of shareholder, though action pending against him for calls. *Re York and London Assurance Company, ex parte Hodsell*, 234
- Commencement by creditor of proceedings for purpose of making joint-stock company bankrupt, does not preclude contributory from subsequently obtaining order for dissolution and winding up. *Quære*—whether a creditor not a contributory, entitled to oppose petition of latter. *Re Port of London Shipowners' Loan and Assurance Company, ex parte Collingridge*, 234
- Usual order made on petition for winding up by allottee, who had paid required portions of deposit on his shares, though petition opposed on ground that all debts and claims had been settled by company, Court not being satisfied that certain claim against company had been decided at law upon the merits, and it being sworn other debts were still due from it, and that several allottees of shares had not paid any portion of share deposits. *Re Direct London, Portsmouth, &c. Railway, ex parte Goldsmith*, 235
- A person having applied verbally for shares in a joint-stock company and upon twenty scrip certificates being sent to him, having acknowledged the receipt of them and paid the deposit, is liable as a contributory, though he has not signed the deed. A party placed on list of contributories not necessarily liable thereby to all the losses and expenses of company, but only to such as have been properly incurred by directors. *Re Universal Salvage Company, ex parte Mansfield*, 258

- A company formed for making a railway in Spain, with board of directors both at Madrid and in London, *locals* of company to be in Spain, and its affairs to be regulated by commercial code of Spain, two-thirds of capital to be subscribed by English shareholders, and remaining one-third by Spanish shareholders, is within the scope of Joint-Stock Companies Winding-up Act, 1848, as regards the English subscribers. *Re Madrid and Valencia Railway, ex parte James*, 260
- Execution of deed of partnership of company by one only of several co-plaintiffs, suing on behalf of themselves and the other partners, not sufficient to sustain the suit, if the objection is taken *in limine*; but Court will give the other co-plaintiffs an opportunity of proving that they sustain the character in which they claim. In suit by a company, for specific performance of an agreement by another company to take a lease or transfer of works, &c. of former, it being objected, by defendants, that such agreement would be destructive of fundamental objects of plaintiffs' company, the Court, at their request, sent this question to be tried at law. *Clay v. Rufford*, 295
- Case in which a party not having executed deed not strictly a shareholder, but being merely connected with company by contract, it was competent to the parties to put an end to the contract by mutual agreement; which having been done, A. properly excluded from list of contributories. *Re Kollmann's Railway Locomotive Improvement Company, ex parte Beresford*, 332
- If the mode prescribed, by deed of settlement, for transfer of shares has not been carried out, no subsequent recognition of title of transferee by directors will operate by way of waiver, as against the company, so as to release the transferor from his liabilities in respect of the shares. *Re St. George's Steam-Packet Company, ex parte Hennessy*, 353
- B. allowed his name to be used as one of provisional committee of projected railway company. Managing committee afterwards appointed, and 100 shares allotted to B, whereupon he wrote to secretary, declining to accept shares, and requiring his name to be withdrawn from list of provisional committee. This request not acted upon. After certain expenses had been incurred by managing committee, scheme proved abortive. B. never having previously interfered in affairs of company, attended certain meetings of provisional committee for winding up affairs of company, and joined in signing an agreement, whereby parties signing agreed to pay a rateable proportion of debts. Under resolutions passed at such meetings, B. paid several sums of money. B. liable as a contributory. A provisional committee formed for carrying out a projected railway, the scheme for which, after certain expenses had been incurred, proves abortive, is "a company" within the meaning of Winding-up Acts. *In re Direct Exeter, &c. Railway, ex parte Busley*, 362
- A person who has allowed his name to be used as a provisional committee-man, but having never acted as such, never having taken the shares necessary for qualifying him to be on the committee, and not having signed the subscribers' agreement or parliamentary contract, is not liable as a contributory. *Re Wolverhampton, &c. Railway, ex parte Cottle*, 366
- Fact of being one of provisional committee not sufficient *per se* to make a person liable for acts of such committee; there must be, either expressly or impliedly, an assent to such acts. *Re Direct Exeter, &c. Railway, ex parte Roberts*, 368
- A feme sole, entitled to shares in a company, having married, but nothing being done with the shares, which continued to be in her name until her death, husband not liable as a contributory, under Winding-up Act, 1848, in respect of losses or liabilities as to shares before or after coverture. *Re Vale of Neath and South Wales Brewery, ex parte Kluck*, 385
- A person who goes to a meeting for purpose of getting up a railway company, but leaves before business commences, refusing to have anything to do with it, and afterwards, under threats from secretary, pays money under protest towards expenses of company, is not a contributory. *Re Direct Exeter, &c. Railway, ex parte Hall*, 386
- Action against shareholder brought in Court of Session in Scotland not an action brought in any of Her Majesty's courts of record, within 5th paragraph of 5th section of Winding-up Act, 1848. Banking company having issued debentures, and an action being brought on one of them against a shareholder residing in Scotland, in Court of Session, and company having declined to indemnify him, he had a right, under 8th paragraph of 5th section, to petition for winding up of company. *Re Royal Bank of Australia, ex parte Latta*, 387
- Discretion of Court as to order for winding up, where there is reason to believe that more harm than good would be done by the order, and that it would not be necessary or expedient. Petition dismissed for winding up banking company at Calcutta, with correspondents in London, which had suspended payments, and where deed of arrangement was executed in India, on ground of alleged improper carrying out of such deed in England. *Re Union Bank of Calcutta*, 388
- By one of the clauses of deed of settlement of company established in 1836 directors empowered to act in such manner as would, in their opinion, best promote welfare of company, and, for that purpose, to make rules, bye-laws, and provisional regulations. A. being an original director, and holding fifty shares, in 1838 arrangement entered into between A. and other directors, under which A. was to retire from direction and give up his shares at par. This transaction not within powers of directors, and A. a contributory in respect of shares held by him. *Re St. Marylebone Joint-stock Banking Company, ex parte Stanhope*, 389
- Banking company projected in June 1836, and A. one of promoters and directors: Bank commenced business on 9th of September: On 24th it was agreed between A. and the other directors that A. should retire: On 18th of October first signature affixed to deed of settlement, which however was dated in August: By that deed it was declared that all acts done by directors previously to its execution should be ratified: On 25th of October A.'s retirement from company advertised in the *Gazette*. In 1841 the company being ordered to be wound up, A. not a contributory. *Re St. Marylebone Joint-Stock Banking Company, ex parte Bust*, 391
- Master's report, upon reference to inquire whether a company ought to be wound up, ought to be confirmed by petition, not by motion. *Re Imperial Salt and Alkali Company*, 393
- The executor of a shareholder in a company, who did not comply with formalities laid down by deed of settlement as to executors becoming members of company in respect of shares of their testators, but received dividends on the shares after testator's death, must be held, either in his own or his representative character, to have made a contract with directors, and should be put on list of

- contributories. *Re North of England Joint-Stock Banking Company, ex parte Goughwaite*, 393
- Company (continued)—Letter of allotment sent to applicant for share contained the words "not transferable," and declared that if deposit not paid in a week allotment should be void. Applicant, not having paid deposit, not a contributory. *Quare*, as to effect of words "not transferable." *Re Direct Birmingham, Oxford, &c. Railway, ex parte Capper*, 394
- Under Winding-up Act, Master properly placed on list of contributories a person who had become a provisional committee-man, upon the understanding he was not to incur any liability for expenses; and no shares having been allotted. *Re Direct West-End and Croydon Junction Railway, ex parte Studley*, 417
- An Anglo-Belgian company, constituted a *société anonyme*, with domicile at Brussels, a board of directors there and in London, and shares divisible equally between English and Belgian allottees, was formed for making a railway and canal in Belgium; but being unable to complete undertaking within time limited, contracted, with concurrence of Belgian Government, to lend the caution-money to other, railway, companies for definite period. On petition of English shareholder, company held to be within operation of Winding-up Acts, and that, notwithstanding collateral contract into which company had entered, the Court had jurisdiction to adjudicate in respect of English shareholders. Reference ordered to Master to inquire whether original undertaking finally abandoned, or merely suspended, and could hereafter, as between company and Belgian Government, be resumed; and, if abandoned or incapable of being resumed, whether it would be expedient to make an order to wind up affairs of company. *Re Dendre Valley Railway and Canal Company, ex parte Moss*, 474
- By deed of settlement of company, husband of female proprietor might, with approbation of directors, become proprietor; but if he did not intend to become such, he was to sell within six months after his title accrued, or in default shares to be forfeited; but in case he should not obtain approbation of directors to become proprietor within the six months, directors were empowered and required, on application of husband, to purchase shares at market price for benefit of company. The husband of female shareholder attended a meeting of company, and proposed certain resolutions thereat, and afterwards applied to directors to purchase his wife's shares upon certain terms; and the transaction was completed within six months after title of husband accrued. Transaction valid within terms of deed, and husband's liability, as contributory, properly qualified by restricting it to period preceding the sale. *Re Vale of Neath and South Wales Brewery, ex parte White*, 497
- A person who has had shares in joint-stock company transferred into his name in the share ledger of company, and has accepted and paid for them and received dividends thereupon, is a shareholder as between himself and other shareholders of company, though no formal transfer was made to him in mode prescribed by deed of settlement. *Ibid. ex parte Walters*, 501
- An allottee of scrip in provisionally registered joint-stock company who sells the scrip certificates in the market, and, after the company obtains its act of parliament, and in default of scripholder claiming to be registered within time required, is registered as owner, and receives sealed certificates of shares, and subsequently pays calls, and sells the shares in the market, is trustee of the shares standing in his name for purchaser of the scrip certificates. Plaintiff (purchaser of the scrip) discovering from answer of defendant (the allottee) that amount received for shares was only 9*l.*, having previously grounds for supposing that larger amount might be recovered, offered to abandon the suit upon payment of the 9*l.* and his costs. Defendant having refused, Court decreed payment to plaintiff of the 9*l.* and costs of suit. *Beckett v. Billborough*, 522
- Several persons proposing to establish a company for making foreign railway, large sums of money were raised by sale of scrip, but scheme failed. Order made to wind up affairs of company. Subscriber afterwards filed bill for same purpose, and also to obtain relief against provisional directors for various improper acts. Though there was a doubt whether case came within acts of parliament, jurisdiction of Court of Chancery not interfered with, proceedings under act of parliament continued, and proceedings by bill stayed. *Parbury v. Chadwick*, 562
- Profits accruing between death of holder of shares and transfer of shares must be paid according to agreement between transferor and transferee. If deed declare shares to be personal estate, they form part of testator's assets, and no new liability having been created under provisions of deed, testator's estate continued liable, and motion asking that liability might be restricted to debts owing by company at death of testator, refused with costs. *Ex parte Blakeley*, 566
- See Railway. Jurisdiction.
- Compensation. See Vendor and Purchaser.
- Contract—Testator having contracted to grant building lease, and dying without having executed it, infant tenant in tail in remainder directed, under 1 Will. 4. c. 60. s. 17, to join in executing lease. *Cullum v. Upton*, 276
- See Infant. Vendor and Purchaser.
- Copyright—Under 5 & 6 Vict. c. 45. parties who have caused a book, written by one of them, to be printed and published for their joint benefit, and duly registered by them as proprietors of the copyright thereof, have a joint right to sue. Defendants having published book in which numerous passages copied from plaintiffs' book, plaintiffs entitled to injunction to restrain sale of defendants' book. *Stevens v. Wildy*, 190
- Corporation. See Ecclesiastical Corporation.
- Costs—Petition served upon solicitor concerned in a cause for two defendants, affected one only, but nothing to shew that service was made in respect of that defendant, and at hearing solicitor appeared for both. The party having no interest entitled to costs. *Kilminster v. Noel*, 25
- Plaintiff filed bill and obtained injunction, upon motion, to restrain infringement of patent, but was directed to bring action to try validity of patent. Action tried and patent declared invalid; and bill then dismissed on motion by defendant for want of prosecution. Plaintiff entitled to costs of original motion as being a successful motion. *Stevens v. Keating*, 25
- General estate and not particular fund liable to costs of inquiry to ascertain parties, next-of-kin, entitled to bequest of money to be raised by sale of real estate, and fact of money having been raised and set apart before next-of-kin ascertained makes no difference, and costs must be raised out of testator's estate. *Dugdale v. Dugdale*, 42
- Security for, by petitioner, for winding up company resident out of jurisdiction. *Re Royal Bank of Australia*, 163
- Junior counsel being called within the bar after

- settling pleadings and before cause at issue, plaintiff not thereby justified in retaining him as third counsel, and not entitled to have his fees allowed on taxation of costs between party and party. Retaining fee for counsel not allowed on taxation of costs between party and party. Fees for attendance of counsel in Master's office (except upon reference for scandal) not allowed in taxation of costs between party and party previously to 120th Order of May 1845. *Green v. Briggs*, 284
- If one of several co-defendants whose costs of suit have been ordered to be paid by plaintiff, and who have carried in joint bill of costs, dies before taxation completed, surviving co-defendants may proceed with the taxation of their own costs without reviving the suit. *Hunter v. Daniel*, 404
- Under Act for indemnity of trustees, tenant for life having petitioned for payment of dividends to her, held, the general personal estate of the testatrix being exhausted, that the costs of petition must be paid out of income, and not out of principal. *Re Lorimer*, 524
- On application of four of directors of railway company, order for taxation of bill of parliamentary agent made, under which directors submitted to pay what should be found due to them. An order being made for winding up company, application made for injunction to restrain parliamentary agent from issuing any process against directors. Their submitting to pay was a personal undertaking, and injunction refused, but without costs. *Re Sudlow, ex parte Dover and Deal Railway*, 524
- Under 6 & 7 Will. 4. c. 79, the Trinity House purchased Skerries Lighthouse, petitioner, an infant, being interested in one-third of purchase-money. The 28th section empowered the Court to order costs of re-investing purchase-money in land to be paid by corporation. Upon appeal, costs of fourth purchase ordered to be paid by corporation, proceedings not being vexatious. *Jones v. Lewis*, 539
- of Attorney General. See Discovery.
- See Account. Administration of Estate. Bankruptcy. Charity. Church. Company. Equitable Assignment. Infant. Injunction. Public Improvements. Railway. Solicitor. Staying Proceedings. Trust and Trustee.
- Counsel**—Authority to consent to compromise. See Infant. And as to Allowance of Fees, see Costs.
- County Court**—The Judges of the courts of common law being upon circuit, a prohibition out of the Petty Bag Office was granted by the Court of Chancery to Judge of county court to prevent him carrying into execution a judgment obtained therein upon a matter stated not to be within its jurisdiction. *Wright v. Cattell*, 527
- Covenant**—A father, on marriage of his daughter, covenanted with her intended husband by deed or will to give, leave, and bequeath to her an equal share with his, the covenantor's, other children in his real and personal estate at time of his death: Daughter died in her father's lifetime, without issue, after new Will Act came into operation: The father, by his will, gave all his real and personal property to executors and trustees for benefit of his surviving widow and daughters, having provided for a son in his lifetime, but not leaving any provision for deceased daughter. Husband of deceased daughter had no good cause of action against executors of father; and if latter had died possessed of no personal estate, and seised only of copyhold estate, husband could not have recovered any substantial damages in such action. *Jones v. How*, 324
- Creditors' Deed**—Revocation of, for benefit of creditors. *Griffith v. Lunell*, 100
- Creditors' Suit**. See Administration of Estate.
- Debtor and Creditor**—Creditor, whose debt is collaterally secured by policy of insurance on life of one of several debtors, under agreement that debt shall not be recoverable during payment of premium by debtors, has a right to enforce payment of debt upon forfeiture of policy, notwithstanding his having, subsequently to forfeiture, obtained renewal of policy. *Wintthrop v. Murray*, 547
- Deed**—obtained from tenant in tail by his brothers, without adequate consideration, and when he was in want of money, without legal advice, set aside, on ground that plaintiff did not know he was entitled to whole estate, and because deed executed without disclosing to him all material facts, known to his brothers, and because there was reason to suppose plaintiff actually misled. *Sturge v. Sturge*, 17
- Executed before any right declared but to defeat a right which plaintiff entitled to establish, considered as executed to defraud plaintiff, and void except as to *bond fide* creditors. Letters of defendant written to his solicitors before deed executed admissible in evidence; but, *quære*, whether letters written after deed can be received as evidence of fraud in execution. *Blenkinsopp v. Blenkinsopp*, 425
- Mutual ignorance of fact not sufficient ground for limiting effect of general words. Upon bill to reform deed, circumstances which were insufficient to raise an equity for relief. *Hawkins v. Jackson*, 451
- Delivery of. See Trust and Trustee. And see Principal and Surety.
- Descent**—The statute 3 & 4 Will. 4. c. 106. leaves the law of inheritance, in cases absolutely plain, as it found it, and was intended only to lay down rules where any doubt exists. And where G. T. being seised in fee of certain hereditaments died intestate, leaving two daughters, Ellen and Sarah, and both daughters died intestate, each leaving a son, it was held the statute did not apply, and that moiety of each daughter descended upon her son, *Cooper v. France*, 313
- Devisavit vel non**. See Will.
- Devise**—void for remoteness. *Scarisbrick v. Skelmersdale*, 126
- Testator devised real estate unto and to use of three trustees, their heirs and assigns, upon trust to pay rents to married woman, for her separate use for her life, and after her death, in trust for all her children who, being sons, should attain twenty-one, or being daughters, should attain that age or marry, and their heirs and assigns for ever. Trustees took whole legal fee, and all the children of tenant for life living at her death, minors and not minors took vested interests, in equity, in estate, subject, as to share of any minor, to be divested in event of his or her dying under twenty-one. *Riley v. Garnett*, 146
- Testator devised real estate to A, his heirs, executors and administrators; but directed if A. should die without issue, estate should go in manner therein mentioned; that if A. should die leaving issue, such issue should take estate. A. survived testator. Words "in lifetime of testator" not to be supplied after words "issue" and "issue" in latter part of will; and A. did not take fee simple. *Gee v. Town Council of Manchester*, 151
- If real estate be devised to A. for life, with remainder to B. in fee, and B. dies in lifetime of A, leaving C. and D. her co-heiresses-at-law, and afterwards C. dies in lifetime of A, without having

in any manner dealt with property, leaving a son E, it is not necessary to trace descent as to C's moiety from B, but for every purpose, E, ought to be taken as standing in C's place with reference to that moiety. *Patterson v. Mills*, 310

Devise (continued)—Testator devised his estate to trustees, to pay rates equally between his nephew James Wilson and other nephews and nieces for life, and upon decease of survivor he devised all his said estates "to a son of James Wilson in marriage, his heirs and assigns." All the tenants for life died. James Wilson had two sons by his first marriage, who died infants and unmarried, and a third son by a second marriage, who survived. This a devise to first son of James Wilson in fee simple, and consequently his heirs were entitled. *Ashburner v. Wilson*, 330

— See Election. Trust and Trustee.

Discovery—A plaintiff is entitled to discovery, not only of that which constitutes his own title, but also to discovery for the purpose of repelling an anticipated defence; and also to discovery of what the case is which defendant relies upon, and how it is made out, that is, the grounds and foundation of defendant's title, but not to discovery of evidence by which it is intended to be supported. The right of discovery is the same between the Crown and a subject as between subject and subject. The stat. 21 Jac. 1. c. 14. has no application to suits in equity. The rule that Attorney General neither receives nor pays costs, will in future be modified in this way, namely, that the Attorney General never receives costs in a case in which he might have been liable to pay costs if he had been a private party. *Attorney General v. Corporation of London*, 314

— An arbitrator cannot, by a general denial of fraud, protect himself from answering those facts which, if admitted, would tend to shew fraud alleged. 38th Order of August 1841 does not enable a defendant, by his answer, to decline answering a question from which he could not, previously to the order, have protected himself from answering by demurrer. *Padley v. Lincoln Waterworks*, 436

Disenters. See Church.

Ecclesiastical Corporation—Railway company upon taking land demised by Dean and Chapter of G. for twenty-one years on beneficial lease, settled separately with lessee and purchased reversionary interest of dean and chapter, and the purchase-money was ordered to be invested in consols. Dividends to accrue on this stock until expiration of term not payable to dean and chapter, but ought to be accumulated. *Ex parte Dean and Chapter of Gloucester*, 400

Election—Case in which a party was held to be bound to elect whether she would take under the will or as heiress-at-law. What amounts to a declaration of election. *Padbury v. Clarke*, 533

Equitable Assignment—G. and B, engineers, had overdrawn their account with their bankers, but large sums of money were owing them from several railway companies, for whom P. & W. acted as solicitors. W. at request of engineers, wrote to Bank for himself and partner, stating that they would, on receiving monies due from railway companies, pay them to bank, to credit of engineers. Manager of bank wrote to P. and W. acknowledging receipt of this letter, as guaranteeing payment of monies received by them on account of Messrs. G. & B.; it also, in postscript, stated amount of balance then due, and that on payment thereof, this letter would be given up to P. & W. G. & B.

subsequently became bankrupts. Such transaction not an agreement for equitable assignment of monies due; and plaintiff not entitled to relief asked. Bill dismissed without costs as against W, and also against P, his partner, though he knew nothing of facts, but with costs of serving G. & B. with subpoena to hear judgment only, and with costs as against their assignees. *Rodick v. Gaddell*, 113

Evidence—Mode of proving affidavits, relating to matters in question, discovered after publication had passed in cause. *Gregory v. Marychurch*, 77

— See Production of Documents. Witness.

Executor—Duties and liabilities of co-executors as to getting in and inserting assets and watching over each other. Direction in will that executors shall call in securities not approved by them does not authorize continuance of that kind of investment which court of equity would not sanction. *Stiles v. Gwy*, 185

— F. B. died, at the house of H. of a contagious disease, and, under the advice of medical men, H. removed from his house with his family while it was cleansed, and the room where F. B. died fumigated. H. to prevent infection, having destroyed the furniture in room where F. B. died; and his executor having paid to H. 160*l.* as compensation for his loss, &c., upon exceptions to Master's report disallowing payment, —Held, it being both necessary to remove and a duty to destroy the furniture, that an implied contract existed, and that executor entitled to be allowed the payment, but parties entitled to further inquiry and exception allowed, with costs. A physician attended F. B. during several of last years of his life without any payment being made to him, but upon some understanding that remuneration was to be made by a legacy, which was not done, and executor paid to physician 100*l.* as remuneration for services performed, which Master disallowed. Upon exceptions to report, Held, that there was nothing to raise an implied contract; that executor had placed himself in situation of physician and not entitled to have payment allowed; and exception overruled, with costs. *Skallcross v. Wright*, 443

— See Administration of Estate. Company.

Foreign Railway. See Company.

Foreign Sovereign Prince—Right of, to sue in this country in respect of property abstracted from public treasury by rebellious subjects. Not necessary to make members of usurping government parties. Doctrine of earmark. *King of the Two Sicilies v. Peninsular and Oriental Steam-Packet Company*, 202

Franchise. See Legacy Duty.

Fraud. See Deed. Settlement.

Fund in Court. See Annuity. Baron and Feme.

Guardian ad litem—Defendants of unsound mind but not found so by inquisition, having on last day allowed them for putting in their answer, obtained from the Master an order for two months' further time to answer, and then by petition at the Rolls, an order for liberty to sue out a commission to assign them a guardian *ad litem*, application by plaintiff, under 32nd Order of May 1845, to assign them a guardian *ad litem*, on ground of default in not putting in their answer, was refused, with costs. *Saunders v. Walter*, 409

— See Practice.

Impertinence. See Pleading. Scandal.

Incumbrance. See Charge.

Infant—Upon petition on behalf of infants who had

- lost their father, for maintenance, inquiry to ascertain whether mother of sufficient ability to maintain and educate them, refused, as contrary to established rules. *Douglas v. Andrews*, 69
- Bill not asking all relief infant entitled to, Court will order new bill to be filed. *Wace v. Bickerton*, 254
- A bill being filed to establish right of infant to moiety of an estate, and at hearing an issue being directed to ascertain legitimacy of plaintiff, upon which his right depended, before trial commenced an agreement for a compromise was entered into, and signed by counsel both of plaintiff and defendant, by which estate to be divided equally between their respective clients, each to pay his own costs, and defendant consented to carry agreement into effect, but he subsequently refused to abide by it. From the want of reciprocity, Court would not interfere unless for benefit of infant; but as this agreement was beneficial to infant, Court would have given its sanction to it; but, in consequence of want of reciprocity arising from the plaintiff's infancy, Court refused to enforce agreement upon withdrawal of consent of defendant. Counsel of defendant had implied authority to enter into agreement; and an order of Court to give effect to it not necessary. Defendant to pay so much of plaintiff's costs of preparing for trial as became useless by refusal of defendant to carry out agreement. Former order to be continued, and trial proceeded with; and costs of petition, on which order made, to be costs in the cause. *Hargrave v. Hargrave*, 261
- Order made that dividends of a very small sum of stock, belonging to six infants, should be paid to their guardian until youngest should attain twenty-one, or further order. *Re Butterfield*, 373
- Application for transfer of consols purchased by means of legacy paid into court under 36 Geo. 3. c. 52, may be made on motion. *Ex parte Bennett*, 375
- See Contract. Parent and Child.
- Inheritance.* See Descent. Device.
- Injunction.*— Proper mode of dissolving common injunction is by orders nisi and absolute; time having expired for taking exceptions to answer not entitle defendant to proceed by special application. *Raincock v. Young*, 135
- After recovery of liquidated damages for breach of contract not to practise as apothecary, legal contract being at an end plaintiff no equity for injunction. *Sainter v. Ferguson*, 170
- Injunction granted to restrain Commissioners of Waterworks from applying rates levied under their act towards expenses of obtaining new act for extending their powers. *Attorney General v. Andrews*, 197
- A suit having been instituted to establish trusts of a will, and a decree made in favour of plaintiffs, and afterwards certain persons, claiming an interest adverse to plaintiffs, having brought an ejectment against them for disputing the will, an injunction was granted upon petition to restrain such action, though no injunction was prayed in the suit. *Turner v. Turner*, 352
- Bill filed to restrain infringement of patent, and injunction obtained upon motion, defendants appearing and opposing, and plaintiffs undertaking to bring action to try their right at law. Plaintiffs failing to establish their right at law, bill ultimately dismissed, with costs, for want of prosecution. Upon appeal, defendants entitled to their costs of resisting motion for injunction as costs in the cause. *Stevens v. Keating*, 407
- See Copyright. Railway.
- Inquiry.*— If one of defendants out of jurisdiction, and it is objected by answers of others that persons not parties to suit claim interest in subject-matter, Court will not order reference for preliminary inquiries and accounts, under 5th General Order of the 9th of May 1839. *Darbishire v. Home*, 458
- Insolvency.*— Plea of, by a co-defendant after bill filed, allowed. *Sergrove v. Mayhew*, 520
- See Priority.
- Insurance.* See Mortgage.
- Interest.*— of Lord Chancellor as a quasi co-plaintiff in subject-matter of suit. *Grand Junction Canal v. Dimes*, 345
- Interpleader.*— Bill filed by A, stating that B, mortgagee with power of sale, of estate belonging to D, and mortgagee of some chattels also belonging to D; that C. had also interest in said chattels; that B, with assent and concurrence of C, had instructed A. to sell all property; that A. had sold it, and had money in his hands; and that A. had afterwards received notice that D. had been made bankrupt, and was required by assignees not to part with money, and praying that B, C, and assignees of D, might interplead together. Demurrer to bill by B. overruled. *Farebrother v. Beale*, 149
- Interrogatories.*— Upon decree opening accounts, Master ordered interrogatories to be brought in for examination of defendants: Objection to fourth interrogatory brought in overruled, and all allowed, and time fixed for defendants to bring in their examination, which was not done till after time twice extended: Upon inquiry into sufficiency of examination, it was for first time objected that plaintiff should have taken in state of facts before proceeding on examination, and subsequently that interrogatories should not have been allowed without previous state of facts having been taken in on behalf of plaintiff. Master not wrong in allowing interrogatories without state of facts. Irregularity waived by submission of defendants, and allowance of time to put in examination. Decree warranted special interrogatory without special state of facts. In case of difficulty Master might direct state of facts to be laid before him. *Alfrey v. Alfrey*, 199
- Interrogatories for examination of witnesses in a cause which were not considered to be leading. The objection may be made at the hearing. *Gregory v. Marychurch*, 289
- Irregularity.* See Interrogatories.
- Joint-Stock Companies Winding-up Act.* See Company.
- Judgment.* See Priority.
- Jurisdiction.*— A perpetual injunction having been granted by decree of Vice Chancellor of England, made in a suit by an incorporated company against defendant, claiming an interest in lands taken by them, and this decree being affirmed on appeal by the Lord Chancellor, motion, by defendant, that order for injunction be discharged, or in the alternative, that bill might be taken off file, on ground of Lord Chancellor being a shareholder in company, refused, with costs. *Grand Junction Canal v. Dimes*, 345
- Deed of settlement of joint-stock company provided, that an extraordinary general meeting, specially called for the purpose, might remove from his office any director for negligence, misconduct in office, or any other reasonable cause. "Reasonable cause" meant such cause as in opinion of shareholders duly assembled should be considered reasonable; and in absence of proof of fraud, Court

could not review resolution of meeting on ground of unfounded statements, and charges not substantiated in such manner and by such evidence as a court of justice would require. *Inderwick v. Snell*, 542

Jurisdiction—of Master. See Answer.

— See Charity. Company. Specific Performance.

Lands Clauses Consolidation Act. See Railway. Specific Performance.

Legacy—Testator by will gave certain annuities and legacies, and directed, as to some of them, that legacy duty thereon be paid out of residuary estate, but as to others, that legacy duty be deducted. Executor only partially paid legacy duties, and left various sums unpaid on both descriptions of annuities and legacies. Commissioners of Stamps and Taxes claimed lien upon residuary estates of testator for unpaid legacy duties in priority over costs of suit and unpaid legacies. Executor personally a debtor for legacy duty where he had deducted it; and where payment has been made to legatee without deduction, legatee, as well as executor, liable with respect to duty which legatee ought to have seen paid; but Crown no claim upon residuary fund. *Wright v. Barnwell*, 38

— Gift to children of legatee not implied after express estate for life; and legacy duty lapsed. *Ranelagh v. Ranelagh*, 39

— Testator gave to trustees 2,000*l.* in trust to invest, and pay income to his daughter for life, and after her death to pay and assign trust fund to his daughter's children as and when they should severally attain twenty-one, in equal shares; to whom he gave and bequeathed same accordingly, with benefit of survivorship in case any child died before his share became payable, and with direction to apply income of their shares for maintenance during minority. Only child of daughter (who died under twenty-one) took vested interest. *Re Bartholomew's Trust*, 237

— Profits arising from duties received under grant of lighthouse to be maintained in a specified place are not liable to probate or legacy duty. *Attorney-General v. Jones*, 266

— Option of taking legacy instead of annuity (see Will). *Wilson v. Wilson*, 279

— Testator directs his trustees, out of his estate, to pay 3,000*l.* to each of his children, as and when they attain twenty-five, and declares it shall be lawful for trustees to apply all or any part of income of each share of his said children for their maintenance and benefit, until he or she attain twenty-five; and to apply any part not exceeding 200*l.* for his or her advancement. Legacies vest absolutely in children at testator's death. *Eccles v. Birkett*, 280

— Bequest void as being contrary to Christianity. Bequest void for uncertainty. *Briggs v. Hartley*, 416

— Head gardener who lived in a house in the garden entitled to legacy under will which gave to each person as servant in testator's domestic establishment at time of his death, a year's wages. Temporary absence not interfere with this right; nor his being hired at weekly wages, not yearly. *Ogle v. Morgan*, 531

Lien. See Production of Documents.

Lighthouse Dues. See Legacy.

Limitations, Statute of—The 3 & 4 Will. 4. c. 27. s. 42, takes away from an incumbrancer upon land, in all cases, the right of recovering as against the land more than six years' arrears of rent or interest; and 3 & 4 Will. 4. c. 42. s. 3. merely restores personal remedy against debtor on covenant. An-

nuity and certain extra premiums for insuring life of grantor being charged upon land, and also secured by covenant of grantor, annuitant only entitled to recover against the land arrears that had accrued due and premiums paid by him within six years from time of instituting proceedings to recover same. *Hunter v. Nockolds*, 177

— See Charity. Partnership.

Lunacy—Residence of committee being at great distance from lunatic and his estate, is not *per se* a disqualification for office. The 13th General Order in Lunacy of October 1842 enables Master to institute inquiries and report thereon without previous order of reference; but report requires sanction of Great Seal. Committees of lunatic, acting with sanction of Master, but (by mistake) without authority of Great Seal, expended large sums in improving estate, and did other acts of important character. Court refused to discharge committees, or direct reference at their cost to inquire as to propriety of acts, no *mala fides* being shewn, and no improper items being pointed out in accounts which had been passed by Master. In lunacy proceedings attendance of heir-at-law required, not for protection of his own interest, but for protection of lunatic. Infant heiress-at-law, residing with her mother, a widow, represented before Master by mother's solicitor, and accounts regularly passed. Court refused, on petition of heiress-at-law, to re-open accounts on sole objection, that heiress at time of passing accounts had no legal guardian appointed. *In re Brown*, 96

— The whole income of a lunatic amounting only to 21*l.* 16*s.* 11*d.*, being the dividends arising out of stock to which lunatic entitled, Court allowed annuity of 30*l.* for life of lunatic to be purchased and paid for out of fund. *In re Fisher*, 521

Marriage Articles. See Settlement.

Master's Jurisdiction—Master has discretion to give the conduct of a sale under a decree to other persons instead of plaintiff for benefit of parties interested. *Dixon v. Pyner*, 402

Misnomer—Defendant by plea stated that plaintiff, J. H. H. C. was commonly called Viscount Alford, and not Viscount Alfred, as stated in bill, and submitted to Court whether he should make any further answer. Defendant might have guarded himself from the error, and was not to be excused from answering, and plaintiff was not to be compelled to correct the error at expense of giving defendant further time to answer the bill; and plea overruled, with costs. *Cust v. Southee*, 526

Mortgage—E. G. by deed conveyed all his real and personal estate (subject as to part of real estate to mortgage in fee from E. G. to mortgagee then in possession) to trustees in trust to sell for benefit of creditors, and to pay surplus to himself, his executors, administrators and assigns. Trustees did not sell mortgaged premises, nor complete trusts for creditors. E. G. filed bill for redemption of mortgaged estates, to which trustees not parties, nor was any mention made of trust deed, but suit not proceed beyond answers. E. G. died intestate, and devisee of heir-at-law filed bill for redemption of same estates, and claimed benefit of E. G.'s suit. Plaintiff not entitled to redeem, because real estate of E. G. was converted by deed of trust into personalty, and not subsequently re-converted, nor deed revoked by E. G. Observations on revocation by author of deed for benefit of creditors. *Griffith v. Lunell*, 100

— By indentures of December 1826, estate conveyed to C. by way of mortgage for 2,000 years,

and, subject thereto, to such uses as A. and B. should jointly appoint, with remainder, in default of such appointment, to A. for life, with remainder to B. in fee: By indentures of December 1839, A, B, and C. conveyed estate to D. (who had paid off mortgage debt created by deeds of 1826), in fee, by way of mortgage, with proviso, that if A. and B. or either of them, their or any of their heirs, should pay mortgage debt, D. would convey estate to A. and B. and their heirs, and a declaration that, as between A. and B. mortgage debt should be considered as a charge on estate, and that A. should pay interest in his lifetime: B. died in lifetime of A. Notwithstanding proviso for redemption in deed of December 1839, estate, subject to A.'s life estate, vested in B. absolutely. *Hipkin v. Wilson*, 305

— Mortgageor having covenanted with mortgagees to insure mortgaged premises against fire in their joint names, and after his decease mortgagees having entered into possession, and insured premises: they were not entitled, as matter of course, to add amount of premiums for such insurance to mortgage debt, and charge it against mortgaged premises. *Dobson v. Land*, 484

Multifariousness—Relief not given upon two transactions in one bill, and demurrer for multifariousness allowed, and leave given to amend bill. *Salomons v. Laing*, 225

Next-of-kin—In marriage settlement, sum of stock given to trustees, after death of husband and wife, upon trust, in case wife died first, "for such person or persons as at the time of the death of the husband should be the next-of-kin of the wife, and would be entitled to her personal estate and effects, his, her, and their executors, administrators and assigns, as if she had died sole and unmarried." Wife died first, leaving five brothers and sisters. On death of husband only one brother living, but there were children of the other brothers. Brother surviving at death of husband took the whole fund as next-of-kin designated in settlement. *Re Webber*, 445

Oath. See Practice.

Orders of Court—5th General Order of 9th of May 1839, 458

- 23rd Order of August 1841, 246
- 38th Order of August 1841, 436
- 32nd Order of May 1845, 409
- 41st General Order of May 1845, 265
- 67th, 68th, and 69th General Orders of May 1845, 459
- 10th of December 1849, i.
- 6th Order of April 1850, 424
- 6th Order of 22nd of April 1850, 311
- 23rd of February 1850, i.
- 22nd of April 1850, ii.
- 3rd of June 1850, xiii.

Parent and Child—Circumstances under which the Court will restrain a father from obtaining possession of his child. *Thomas v. Roberts*, 506

Parties—In a suit by plaintiffs for administration of estate of A, an intestate, plaintiffs claimed to be next-of-kin of A. as being children of B, a sister of A, but stated that B. had had other children, C. and D, who, by reason of illegitimacy, had no interest: Administrator, by his answer, submitted that C. and D. ought to be made parties. Cause being set down on an objection for want of parties, objection ordered to stand for the hearing. *Pike v. Barber*, 373

— See Account. Administration of Estate. Arbitration. Railway.

Partnership—Right of administratrix of deceased partner to sue, after assignment of all interest to a third party. Benefit of renewed lease. *Clegg v. Fishwick*, 49

— By agreement, partnership between two solicitors was to be dissolved, accounts taken, and continuing partner to pay an annuity quarterly, for three years, to retiring partner. Latter died before expiration of third year, without having received any part of annuity. On bill, filed within six years from his death, but after six years from quarter day preceding it, annuity part of agreement, and his representative entitled to specific performance of whole of agreement; irrespective of question whether he was or was not barred by Statute of Limitations from recovering annuity in court of equity. *Murray v. Parker*, 530

— See Acquiescence.

Pauper—Plaintiff being entitled to annuity of 20*l.* a-year, which her brother ordered to be secured to her, filed bill to have it secured, and obtained order to sue *in forma pauperis*. Executors of her brother, though they did not admit assets, paid annuity, but this fact not being stated to the Court, order to sue *in forma pauperis* was discharged. *Butler v. Gardiner*, 473

Payment into and out of Court—After hearing, and before cause came on for further directions, plaintiff having moved, on admissions by defendant in his answer, for payment of sum of money into court, such admissions not alone sufficient to induce Court to make the order, and motion refused. *Binns v. Parr*, 401

— A railway company having taken land settled on A. for life, with remainder to his issue, and paid the purchase-money into court, and an agreement for investing this sum, with exception of 30*l.* in purchase of other land, having been approved of by the Master, on petition for carrying out the agreement, ordered that the 30*l.* should be paid to A, he undertaking to lay it out in lasting improvements. *Ex parte Barrett*, 415

— See Trust and Trustee.

Perpetuity. See Charity.

Petition. See Railway.

Pleading—Plaintiffs filed bill against executors for administration of their testator's estate and for payment of debt alleged to be due to them from estate of deceased, interrogatories being framed with great minuteness, requiring executors to set forth all particulars relating to testamentary property, and whether defendants, or one and which of them, do or does not refuse to pay plaintiffs the amount of their demand, or some and what part thereof, and why. One of the executors, in answer stated various facts relating to previous money transactions between himself and plaintiffs as reason for doubting accuracy of plaintiffs' claim. Exceptions being taken to answer for impertinence, and allowed by Master, upon exceptions to Master's report, Court held that defendant justified, in answer to pointed form of interrogatories, in setting forth what he had done; and allowed exceptions to Master's report. *Robson v. Brougham*, 465

Power—Vested interest under appointment whereby vesting depended on event which had happened when deed executed. *Re Williams*, 46

— Testator devised, in 1835, all his real estate to his wife for life, with remainder as to part to two joint tenants for life, and directed same to be sold on death of survivor. He bequeathed monies arising from sale to individuals of certain class then living, and appointed his wife and others executrix and executors. Will contained no power other than

- direction to sell, nor was any donee named. Power of sale vested, by implication, in surviving executors. *Curtis v. Fulbrook*, 66
- Power (continued)—Execution of power appointing stock standing in name of Accountant General, must be verified by affidavit, notwithstanding probate of will in ecclesiastical court. *Smith v. Somers*, 148
- Under marriage settlement power given to husband to appoint among children by his last will and testament "to be signed and published by him in the presence of three witnesses." Power was executed by will, and "signature" of testator witnessed by three witnesses. Will signed and published in presence of witnesses, and this a good execution of power. *Re Wrey's Trust*, 183
- See Will.
- Practice—*Semble*, party who, on original hearing, does not oppose decree, not generally allowed to re-open discussion by appeal or rehearing. *Christ's Hospital v. Grainger*, 33
- Authority of Master under ordinary reference to tax costs of trustee acting in cause as solicitor for himself, his co-trustee, and *cestuis que trust*. *Cradock v. Piper*, 107
- On hearing, Court expressed opinion that case one which was proper for an issue, but at request and with consent of all parties undertook to decide the cause. By such consent, parties precluded on appeal from asking for issue, or review of decree of Court below, if question raised is one which, according to course of Court, ought, in first instance, to have been sent to a jury; but Court permitted appellant to shew, if he could, that case so clear upon proceedings that Court might decide it without directing issue. *Stewart v. Forbes*, 133
- If defendant incapacitated from answering through illness, but in possession of mental faculties, proper course is to extend time for answering as occasion may require, and order for guardian for purpose of putting in answer and defending suit discharged. *Willyams v. Hodge*, 196
- Person not party to cause cannot petition for rehearing without special leave of Court. *Berry v. Attorney General*, 232
- Staying suit, upon offer to pay plaintiff's demand. *Sawyer v. Mills*, 242
- Plea of illegitimacy must be put in upon oath. *Wild v. Gladstone*, 286
- Bill being filed by plaintiff on behalf of himself and all other shareholders in a company, praying that defendants, directors of company, might be ordered to repay to shareholders all sums which might appear to have been improperly paid by them out of funds of company, defendants entitled to dismiss upon payment to plaintiff of sum claimed by him together with his costs, plaintiff having complete dominion over suit, and being the only person with whom defendants could deal. *Scarth v. Chadwick*, 327
- Defendant, having filed three answers, which were reported insufficient, filed a fourth answer before certificate of insufficiency of third answer obtained. Motion by plaintiff, under 10th Order of 1828, to have fourth answer taken off file, granted. *Corporation of Liverpool v. Chippendale*, 327
- Upon motion for leave to file claim to take certain partnership accounts alleged to have been irregularly kept, and for an injunction, held, that the orders were not intended to apply to special case of this nature. Also, that such claims did not require signature of counsel. *Carmichael v. Ogilby*, 424
- See Misnomer. Staying Proceedings. Supplementary Bill.
- Time for answering. See Answer.
- Principal and Surety—Liability of sureties of treasurer of borough fund. Mayor, *etc.* of *Berwick-upon-Tweed v. Murray*, 281
- Testator advanced 1,000*l.* to W. on his bond, in which J. joined as surety. W. becoming involved in his affairs, arranged with his creditors to pay 1*l.*s. in the pound, testator guaranteeing payment. Assets of W. not sufficient for payment of composition if testator had enforced payment of his bond debt. Upon appeal, effect of transaction was to give time to principal debtor, as testator, after having joined in compromise, could not have enforced his demand upon bond to disappointment of trade creditors, and, consequently, surety discharged. *Cross v. Sprigg*, 528
- Farley & Co., bankers, were creditors of firm of H. B. & Co., which consisted of M. A. H. and J. B. S. H., a married woman, having property settled for her separate use, joined as surety with J. B. in several promissory notes and bills of exchange to F. & Co., to secure debt due to them from firm of H. B. & Co. Firm of H. B. & Co., being greatly in debt to F. & Co., dissolved partnership. Articles of agreement entered into between M. A. H. and J. B. and F. & Co., which provided that J. B. should carry on business alone; that J. B. should pay debt due to F. & Co. by monthly instalments. F. & Co. also agreed not to sue M. A. H. or require payment from her of partnership debt; but remedies of F. & Co. against sureties of M. A. H. and J. B. & Co. expressly reserved. Bill filed by F. & Co. to make securities of S. H. as surety available; and upon motion for receiver of income of her separate property, held, that deed made material alteration in relation subsisting between creditors and principal debtors, but that from state of authorities respecting reservation of rights of creditors against sureties, Court bound to give effect to what appeared to have been the law as administered in this Court, and if defendant could not give security for what plaintiffs might receive out of her settled estate, to appoint receiver to secure fruit of suit if law should be ultimately established in favour of plaintiffs. *Owen v. Homan*, 549
- Priority—The rule, that plaintiff in original suit by amending his bill after cross bill is filed loses his priority of suit, and cannot call upon defendant to answer amended bill, before he answers cross bill, does not prevail, where exceptions being taken to answer to original bill for insufficiency, and allowed, plaintiff, under an order to amend and for defendant to answer amendments and exceptions together, amended his bill after cross bill filed, but having served notice of order to amend, before he was served with subpoena to answer cross bill. *Gray v. Haig*, 446
- Insolvent within a year previous to insolvency executed mortgage upon certain property, with power of sale for mortgagee to pay himself off, and residue to go to insolvent, his appointees and assigns. Insolvent had subsequently executed a warrant of attorney to plaintiff, on which judgment entered up, and he was taken in execution. He then presented his petition under Insolvent Act, and before his discharge mortgagee sold under his power of sale. Plaintiff entitled to priority in respect of his judgment over other creditors. *Robinson v. Hedger*, 463
- See Charge. Stop Order.
- Privileged Communications—Letters sent by defendant, residing at Quebec, to his agent for purpose of being communicated to his solicitors, and having reference to the suit, are privileged. *Reid v. Langlois*, 337

Production of Documents—Motion for production of documents in which defendant had joint interest with an absent party, refused. Defendant, residing at Quebec, by his answer admitted possession of letters sent by him "to his agent" for purpose of being communicated to his solicitors, and which had reference to the suit. These communications privileged. On motion for production of documents, it is not sufficient for plaintiff to read detached insulated passages from answer admitting possession, but he must take the whole case as stated in answer. *Reid v. Langlois*, 337

— A person in possession of documents may be served with and examined at hearing upon *sub poena duces tecum*, under 24th Order of May 1845; but *semble*—examination must be confined to questions relating to mere purpose of production of document. If such person admits possession, but objects to produce document because he has a lien upon it, Court will not order its production. *Griffith v. Lunell*, 399

— Order for production of deeds, &c. will not be made against administrator of deceased defendant, though suit revived, and though order previously made against defendant himself, and there being nothing to shew they were in possession of administrator. *Scott v. Wheeler*, 402

— Bill filed by heir-at-law of testator against purchaser from his devisees in trust for sale, to set aside conveyance on ground that purchaser had acted as solicitor to devisees, and consideration inadequate. Defendant, by his answer, insisted that title materially defective, and, regard being had to that, consideration adequate, admitting possession of title deeds. Title deeds must be produced. *Shallcross v. Weaver*, 450

— If entries in trade books of defendant may shew infringement by him of alleged custom for benefit of plaintiff, Court will order production of trade books for inspection of plaintiff before hearing, and before existence of custom has been proved, notwithstanding existence of such custom is denied by answer of defendant. *Ord v. Fawcett*, 487

— See Company.

Prohibition. See County Court.

Property and Income Tax. See Administration of Estate.

Public Improvements—R. C. obtains agreement for lease of premises, and agreement is deposited with his solicitor, who subsequently agrees to advance 300*l.* to R. C. for repairs, upon his signing memorandum charging them with amount, and all further advances not exceeding 500*l.*: Premises afterwards taken by corporation of London, by virtue of act of parliament for making public improvements, and in consequence of questions between R. C. and his solicitor respecting amount due upon security, also of notice of judgment debt due by R. C. purchase-money paid into court. Upon petition by R. C. asking for account, and that 500*l.* be set apart to answer sum found due from him to his solicitor, and that surplus, after payment of judgment debt, be paid to R. C. debt between R. C. and his solicitor directed to be ascertained by Master; and corporation need not attend, but must pay costs of petition, but not of affidavits made relating to claims of parties. *Ex parte Collins*, 244

Railway—Railway company purchased certain land, devised to petitioner for life, and then to his children. Tenant for life had mortgaged his life estate, and mortgagees made parties to conveyance to company. Purchase-money paid into court. Tenant for life presented petition for its investment. Mortgagees served, and asked for costs. Such

costs must be paid by mortgagor, and not by railway company. *Re Lancashire and Yorkshire Railway, ex parte Smith's Estate*, 58

— Railway company having notice that lands required for purposes of railway were mortgaged, and that mortgage money could not be paid off until March 1851, paid purchase-money into court, upon valuation, to credit of mortgagor, and entered upon lands without any communication to mortgagees, and without providing for expenses of reinvestment or costs of mortgagees, or any compensation for difference of interest. Such entry wrongful, and injunction granted. *Ranken v. East and West India Docks and Birmingham Junction Railway*, 153

— Claimant who had given notice to railway company of claim for compensation under sect. 68. of Lands Clauses Consolidation Act, but whose title to compensation doubtful, restrained by injunction from proceeding upon notice, or taking other steps to recover amount claimed by him; but with liberty to bring action against company, and company directed in such action to admit notice, and that they had not taken proceedings to summon jury within time prescribed; either party to be at liberty to apply after trial, and parties undertaking to use judgment as Court should direct. *London and North-Western Railway v. Smith*, 193

— Railway companies bound to apply monies authorized to be raised by act of parliament, for purposes directed by act, and after setting apart sufficient to meet contingencies, surplus may be divided among shareholders. Dividends belonging to shareholders may be applied by them severally, but neither company nor any assemblage of shareholders can dispose of portion of any shareholder in general dividends without his consent. Any dealing with capital of company not authorized by act of parliament is illegal, and relief may be given in this court. Company having lawfully obtained shares in another company no reason why such company should purchase other shares in same company, and divert funds from purposes for which they were raised for support of another company; and demurrer for want of equity overruled. *Salomons v. Laing*, 225

— Railway company applies portion of capital of company, raised under powers given by act of incorporation, in purchase of shares in Direct L. and P. Railway, which latter company has full notice of purposes for which monies raised by company advancing it. Upon demurrer, for want of equity, to bill filed by individual shareholder, two companies guilty of fraud and collusion, and parties to same breach of trust, and Direct L. and P. Railway Company properly made parties to the suit, they having made themselves principals in the transaction. Also, plaintiff, as individual member of company applying the money, has not only a right to sue the company, of which he is a member, for an illegal act, but also the other company, and all persons receiving benefit of that act, without having first made an attempt to get concurrence of the whole corporation of which he is a member. *Ibid.* 291

— Upon petition for investment of money paid in under Railway Act, introduction of railway clauses not unnecessary, and petitioners entitled to costs. *Re Lilly's Devises*, 329

— Certain glebe lands belonging to rectory of K. O. having been taken by railway company, and money paid into court, notice to company of petition presented by rector for investment of money unnecessary. *Re Leeds and Thirsk Railway*, 329

— Directors having intimated an intention to apply

to parliament for leave to abandon a part of intended railway, but having proceeded to make calls generally, upon bill filed by individual shareholder, praying that company might be restrained from employing funds except for purpose of constructing whole line, and from making calls or enforcing payment by action, or declaring shares to be forfeited, — Held, upon demurrer, by directors, for want of equity and for want of parties, that power to raise money for general purposes of undertaking, and for other purposes connected therewith, was not sufficient to enable company to apply funds at large. Also, that an allegation that company had abandoned part of line, and that it would be illegal to apply funds to complete part not abandoned, was insufficient, there being no allegation of any intention to apply funds to complete part not abandoned, though it might have been properly introduced. Demurrer allowed, and leave given to amend. *Hodgson v. Powis*, 356

Railway (continued)—Bill filed against railway company, their secretary, and engineer, stating that plaintiff had contracted with company to execute certain works, and that company had agreed to pay for them in specified manner, with proviso that works should not be considered as executed unless engineer of company should certify to that effect, and that engineer, upon notice, should proceed to examine works, and if properly executed, should certify same, and thereupon plaintiff should be entitled to recover; that works had been completed properly, but that engineer, acting under direction of and in collusion with company, refused certificate: Bill prayed a declaration that such refusal a fraud upon plaintiff, and for an account and payment of sums due to him. All the defendants having put in a general demurrer, upon appeal, decision of Court below overruling demurrers, affirmed. *Macintosh v. Great Western Railway*, 374

— *Semble*—The 69th section of Lands Clauses Consolidation Act does not authorize investment of purchase-money of freehold estate in copyhold property. But, upon report of Master that such investment fit and proper, and for benefit of persons interested, Court will, in certain cases, sanction such investment. *Re Cann's Estate*, 376

— Upon a bill which contemplates continuance of company, the Court cannot entertain jurisdiction and assume to interfere in internal management of company. Bill praying inquiry and injunction to restrain payment of more of certain calls than found necessary, defective for want of parties, as plaintiff sued, as well for shareholders who had paid as for those who had not paid, and also because bill did not allege that holders of certain other shares were fully represented by defendants. Clauses in railway act upon which plaintiff intends to rely should be stated in bill, and, if omitted, cannot be referred to, upon demurrer, although act is a public one. *Bailey v. Birkenhead, &c. Railway*, 377

— The holder of scrip certificates has an equity to see money applied to specific purposes for which it is authorized by company's acts to be raised; and a resolution stating purposes for which it was to be raised is binding upon company. *Bugshaw v. Eastern Union Railway*, 410

— Upon application for injunction, railway company, formed by three acts of parliament, each of which authorized separate line of railway to be made, and empowered company to raise separate sum of money, to be considered as part of general capital, after they had made a part of their line of railway, but were unable to complete their contract with the public for making the whole series of lines,

restrained from making calls, or declaring shares forfeited, even though purpose was for completing that portion of line which had been made. Circumstances under which Court might be induced to exercise a discretion, and allow works to be completed. *Hodgson v. Powis*, 418

— Brighton, Lewes and Hastings Railway Company empowered to transfer portion of line thereby authorized to be made to South-Eastern Railway Company. Act contained provision that, if portion of line to be transferred should not be completed within three years from such transfer, it should not be lawful for South-Eastern Railway Company to pay any dividends until whole of railway should be opened to public for traffic. On 21st of August 1845, deed executed transferring portion of line to South-Eastern Railway Company, but they neglected to complete that portion of line within the three years limited for that purpose. Act imperative, and South-Eastern Railway Company could not, after expiration of the three years, pay any dividend whatever until line opened to public for traffic. Court may exercise a discretion, and upon proper case being made may abstain from exercising its authority to restrain payment of dividend which had been declared, and leave given to bring forward such a case on affidavit. Plaintiff by receiving dividends not prevented from applying for intervention of Court to prevent a public benefit from being carried out, and company and directors restrained from paying any future dividends, and also, insufficient case having been made, from paying dividend which had been already declared until line opened for traffic. *Carlisle v. South-Eastern Railway*, 477

— If company take possession of premises under 85th section of Lands Clauses Act, particulars of claim should be sent in, and in case company do not agree or do not proceed within twenty-one days to summon a jury, such claim will become an absolute right. *Adams v. Blackwall Railway*, 557

— See Company. Costs. Payment out of Court. Specific Performance.

Rate—Application of water-rate to expenses of obtaining new act of parliament. *Attorney General v. Andrews*, 197

Reciprocity. See Infant.

Reference. See Amendment.

Remoteness. See Accumulation.

Revivor. See Bill of Revivor.

Sale—Estate settled on A. for life, with remainder to B. in fee: in 1822 B. sold reversion to C: in 1830 A. died: in 1846 B. filed bill to set aside sale of reversion on ground of sale being under value. No evidence being given by B. to account for delay, B. barred by lapse of time. Rule in equity as to sales of reversions at undervalue. *Sibbings v. Earl of Balcarras*, 252

— See Master's Jurisdiction.

Scandal and Impertinence—Master's report finding plaintiff's bill scandalous and impertinent having been, upon exceptions taken both by plaintiff and defendant, varied by the Court, 41st General Order of May 1845 inapplicable, and order made directing Record and Writ Clerk to expunge the parts considered by the Court to be scandalous and impertinent. *Jodrell v. Jodrell*, 265

Sequestration—Authority of surrogates to issue sequestration to compel orders of Judicial Committee of Privy Council. *Blenkinsopp v. Blenkinsopp*, 425

Settlement—In March 1837, H. died intestate as to real estate, and indebted far exceeding personal estate, leaving M. H. his only child and heiress-at-

law. In August 1837, M. H. then a minor, married Insall, and previously to marriage, articles executed by which M. H. and Insall covenanted to settle descended estates for benefit of herself, her intended husband, and children; and articles provided that parties thereto might at any time within six months after M. H. came of age, vary all or any of limitations agreed to be made, and that settlement to be made should contain power of revocation and new appointment. Mrs. Insall attained her age in January 1839, and in May 1840 settlement executed purporting to be in pursuance of articles, and containing power of revocation, and two days afterwards power exercised in providing for debts of H. In September 1840 Mrs. Insall died, and in 1844 suit instituted by child of marriage impeaching deeds of May 1840, to which suit no creditor of H. a party. Settlement (except as to legal estate) and subsequent appointment invalid, and property bound by trusts of articles. Creditors' suit being instituted in 1844, descended estates comprised in articles, were assets available for payment of debts of H. *Pimm v. Insall*, 1

— Proof of debt existing at date of voluntary settlement and unsatisfied at settlor's death, not sufficient to invalidate settlement; it must appear that settlor's property, not included in settlement, was inadequate to meet his then existing debts. In suit by creditor of settlor, to impeach voluntary settlement, inquiries directed as to what debts owing by settlor at time of execution of settlement and at his death; and what amount of settlor's property not included in settlement at time of its execution. *Starff v. Souby*, 30

— By post-nuptial settlement property vested in trustees, upon trust, to pay income to such persons as H. G. (married woman) should from time to time appoint, without power of anticipation; and in default of appointment, into her own hands for her separate use, independently of B. G. her husband; and after her decease to B. G. for life; and after death of survivor to children of marriage. B. G. died, and H. G. having married again, joined with her second husband in assigning income of trust fund. Restriction against anticipation co-extensive with life of H. G. and its effect not cut down by subsequent reference to then existing coverture; and therefore, assignment by wife and her second husband void. *Knight v. Knight, Benson v. Benson*, and *Bradley v. Hughes* impugned. *Re Gaffee's Settlement*, 179

— Conveyance, in marriage settlement, by A. of Whiteacre and Blackacre, on usual trusts, and covenant by A. that property worth annual sum of 200*l.*, and that he was seised in fee simple, free from incumbrances: A. entitled in fee simple to Whiteacre, worth 50*l.* a-year, but only to estate for life in Blackacre, worth 190*l.* a-year. In suit by only child of marriage against executors of A, plaintiff entitled, out of A.'s estate, not merely to sum that would produce difference between 50*l.* a-year and 200*l.* a-year, but to sum that would produce 190*l.*, annual value of Blackacre. *Wace v. Bickerton*, 254

— Estates limited by settlement to use of trustees for term, upon trust, in first place by cutting, &c. and converting into money certain timber, or by demising, mortgaging, or selling settled estates, or by any other reasonable means to raise certain charges; and subject to term, estates limited to use of several successive tenants for life, without impeachment of waste, with divers remainders over in tail. Trustees right in raising charges by mortgage of estates, without resorting to timber, as between tenant for life and remainder-men, former

was to keep down interest and corpus of estate to bear charges; and tenant for life, being unimpeachable for waste, entitled, as part of profits of estate, to timber which he had a right to cut. *Marker v. Kekewick*, 492

— Husband and wife assigned reversionary interest in trust funds belonging to wife, as security for money, and husband subsequently deserted his wife, and they both survived the tenant for life. Upon petition, wife entitled to settlement, and as between herself and her husband's assignee, her having committed adultery immaterial, and not deprive her of that right. *Greedy v. Lavender*, 494

— See Next-of-Kin. Power.

Severance. See *Charity*.

Ship and Shipping—Case in which Court, at the hearing, refused to make decree in respect of plaintiff's claim to ship, in absence of registered owner and others claiming interest in it; but, subsequently, upon plaintiffs waiving all interest in ship if unsold, gave them decree (without prejudice) for inquiry as to proceeds of sale of it: and, on further directions, sent questions as to property in cargo under bills of lading to plaintiffs, and in freight, to be tried at law. *M'Calmont v. Rankin*, 215

— Fraud under Ship Registry Act and Foreign Enlistment Act. Corporation cannot be indicted under Foreign Enlistment Act. *King of the Two Sicilies v. Peninsular and Oriental Steam-Packet Company*, 488

Solicitor—Payment of legacy duty and stamps by town agents in passing accounts of administrator can only be made as agent, and is not a professional disbursement; it ought to be inserted in cash account, and not in bill of fees and disbursements. *Re Haigh*, 79

— Master has a discretion in requiring evidence of fact of agency, and in cases of agency solicitors can only carry in one bill of costs. *Deere v. Robinson*, 405

— Petition presented by husband and wife, relating to her separate property; objection taken to its being heard on ground that there was no security for costs; solicitor of petitioners instructed counsel to undertake to amend petition, if required by Court, by making it petition of wife by her next friend: petition accordingly heard, and order made, but petitioners ordered to pay costs. Petitioners and the solicitor afterwards declined to amend petition, though ordered by Court so to do; and upon application that they might do so in four days, or that solicitor might perform his undertaking,—Held, that undertaking of solicitor could only be considered as undertaking of client, and that no order could be made against solicitor personally, but he was refused his costs. *Re Williams*, 422

— In November 1845, A, an infant, was bound as articled clerk to B, an attorney and solicitor, for term of five years, and premium of 200*l.* paid to B. by mother of A; and in consideration thereof, B. covenanted with mother that he would teach and instruct A. in practice of an attorney and solicitor, which B. did then or should during said term use or practise. B. having, in October 1847, died, in suit by A. and his mother against executors of B, Court referred it to Master to inquire and state what proportion of premium ought to be returned; and upon appeal, decree affirmed. *Hirst v. Tolson*, 411

— See *Costs*. Witness.

Specific Performance—In suit for specific performance of a written agreement, defendant cannot set up as a bar to the suit that written agreement does not contain all the terms of real agreement, without

very clear proof of the omission by mistake of some term in written agreement. *Clay v. Rufford*, 295
Specific Performance (continued)—A, the owner of lands in the line of a railway, agreed in writing to sell portion thereof to company, subject to company making such roads, &c. as might be necessary to connect portions of A.'s lands which would be severed. A. conveyed the land comprised in agreement to company, who entered and made their line. This a contract which would be enforced in equity, and jurisdiction of Court not ousted by Lands Clauses Consolidation Act, none of provisions of which respecting mode of ascertaining compensation are applicable to case of purchase by agreement, but only to compulsory taking of lands by company; and Court referred it to Master to inquire and state what roads necessary and proper. *Sanderson v. Cockermouth and Workington Railway*, 503

— See Partnership. Vendor and Purchaser.

Statute—36 Geo. 3. c. 52, 375

— 11 Geo. 4. & 1 Will. 4. c. 60, 312

— 1 Will. 4. c. 60. s. 17, 276

— 3 & 4 Will. 4. c. 55, 215

— 3 & 4 Will. 4. c. 106, 313

— 4 & 5 Will. 4. c. 22, 66

— 1 Vict. c. 26. s. 24, 63

— 1 & 2 Vict. c. 110, 331

— 7 & 8 Vict. c. 111, 234

— 8 Vict. c. 18. s. 68, 193

— 8 Vict. c. 18. s. 69, 376

— 10 & 11 Vict. c. 96, 89, 524

— 11 & 12 Vict. c. 45, 234

— 12 & 13 Vict. c. 108, 234

— Construction of. See Descend. Injunction.

Staying Proceedings—Bill filed by mortgagee of an advowson for foreclosure of his mortgage, and for further relief. Defendant filed answer; and after order made in cause, in which costs given against plaintiff, plaintiff died, and his executors, instead of reviving original suit, filed new bill praying same relief as to foreclosure of mortgage, but omitting further relief included in original bill. Motion granted to stay proceedings in second suit until payment of costs of first suit and order made therein. *Long v. Storie*, 148

— Two creditors' suits instituted against same defendant for administration of same estate, and decree obtained in suit secondly instituted. Motion by defendant to stay proceedings in first suit refused, on ground that first suit sought more extensive relief than second. *Underwood v. Jee*, 171

— See Practice.

Stop Order—Testator devised real and personal estate to trustees on trusts for sale, and directed them to pay a share of produce to A, and a suit was instituted for administration of his estate: By deed, dated in December 1844, A. assigned this share to B. to secure certain advances, and B. immediately gave notice of assignment to trustees: By order made in cause in June 1845, real estates of testator ordered to be sold, and produce paid into court and invested; and a sum of stock, in respect of purchase-money, afterwards carried to credit of cause: In April 1846, C. obtained judgment against A, and by Judge's order stock ordered to stand charged with amount for which judgment obtained. Order filed in Accountant General's office in November 1848, at which time no other order had been filed. C. had not priority over B. *Beardiffe v. Dorrington*, 331

Supplemental Bill—A bill being filed by shareholders of company against directors for an account, and one of directors becoming bankrupt, supplemental bill was filed against defendant, alleging that plaintiff had discovered, since filing original bill, that

said director, before his bankruptcy, had paid or secured to defendant the amount for which he was liable to the company. Demurrer to supplemental bill allowed, the case for relief existing prior to filing original bill, and plaintiff not being entitled to that relief, if entitled at all, prior to the bankruptcy. *Deeks v. Walker*, 274

Thellusson Act. See Accumulation.

Trial at Law. See Company.

Trust and Trustee—Testatrix, being seised of equitable estate in fee, devised it to her executors in trust to sell, and out of proceeds of such sale and her personal estate to pay her debts, &c., and legacies given by her in certain paper signed by her and marked A. Testatrix died without heirs, and paper A. could not be found. Trustee of legal estate no right to hold estate for his own benefit upon payment of debts, but bound to convey to executors, devisees, without reference to purposes for which conveyance required. *Onslow v. Wallis*, 27

— *Cestuis que trust* proposed to pay off mortgage on trust property, by raising necessary funds at less expense and at lower rate of interest than would be required by another mode of raising monies proposed by solicitor of trustees; and *cestuis que trust*, without concurrence of trustees, carried out proposal, and pending these transactions one of trustees of settlement retired, and in his room near relative of their solicitor appointed trustee, but without any communication on subject with *cestuis que trust*. Trustees afterwards gave notice of their intention to sell property under power of sale and exchange, and to defray out of proceeds their costs, charges and expenses of negotiating treaty for loan they had proposed to effect. Sale prevented by injunction, and bill filed by *cestuis que trust* against trustees and their solicitor. Contemplated sale would have been breach of trust. Under circumstances, trustees removed and new trustees appointed, but no costs of suit in respect of such removal or appointment given, because another suit might be necessary in respect of transfer and further charge effected by plaintiffs; and bill dismissed as against solicitor, without costs. *Marshall v. Sladden*, 57

— Annuitant, selling under power of sale, is a trustee, as regards sale, for grantor; and agent for sale of such annuitant, equally with his principal, affected with all disabilities attaching to trustee purchasing for himself. Upon payment of money into court by trustees under 10 & 11 Vict. c. 96, Court may either adjudicate upon matter upon petition and affidavits, or may direct bill to be filed if complexity of case require more formal proceeding. *Re Bloye's Trust, ex parte Lewis*, 89

— Under ordinary reference to tax costs of trustees it is competent to Master to take notice of fact, that trustee appeared for himself as solicitor in proceedings, and to disallow him all costs, except costs out of pocket. The rule that a trustee, a solicitor, appearing for himself as party to suit is only entitled to costs out of pocket, not extend to case of trustee acting as solicitor in cause for *cestuis que trust* or co-trustees; and where such trustee had appeared jointly for himself and his co-trustees, and no extra costs had been occasioned thereby, he was allowed full costs of such appearance. Where order of Court below held upon appeal to be right in effect, though founded upon erroneous principles, appeal dismissed, with costs. *Cradock v. Piper*, 107

— Trustees not bound to ascertain validity of claims upon trust fund, but may discharge themselves of all responsibility whenever they please by paying fund into court under Trustee Act, and

- they will be entitled to their costs. *Re Croyden's Trust*, 172
- Under power for *cestuis que trust* in case trustees, or either of them, should die, or be desirous of being discharged from trusts, to appoint any other person or persons to be trustees or trustees in place of any such trustee or trustees so dying or being desirous to be discharged, one trustee having died, and other two desirous of being discharged, appointment of two new trustees only, is good, and two continuing trustees having refused to transfer fund to new trustees, and paid trust fund into court under Trustee Act, they were ordered to pay costs thereby occasioned, and costs of petition for payment of money out of court. *Re Fagg's Trust*, 175
- Trustees, with notice, having permitted parties to proceed, and obtain orders, without applying to Court for leave to be heard, cannot subsequently be heard to say that no valid order had been made against them. Trustees not prejudiced by order to deliver deeds out of court, which were never in their hands. Petition dismissed, with costs. *Doyle v. Doyle*, 246
- Order made for repayment of trust fund to trustee, for purpose of discharging liabilities of testator recently discovered. *Ex parte Tournay*, 257
- Claim by trustees and devisees of real and personal estate to have will of their testator established against co-heiresses-at-law, and trusts carried into execution, and personal estate administered, permitted to be filed. *Rickford v. Young*, 311
- In creditors' suit decree made that equity of redemption in estates of testator devised by him, subject to certain mortgages and incumbrances, be conveyed to such of respective mortgagees as should be willing to release testator's estate from their respective debts. Devisees under will (two of them being married women) refused to execute deed of such conveyance, tendered to them by mortgagee, and approved by Master. On petition of mortgagee, presented under Trustee and Mortgagee Act, a person was appointed by Court to execute conveyance in place of devisees. *Hood v. Hall*, 312
- Testator appointed A, B, and C. to be trustees of his will, and declared that, if trustees thereby appointed or any of them should happen to die, it should be lawful for surviving trustees or trustee to appoint any other person or persons to be trustee or trustees in place of trustee or trustees so dying; and that, on such appointment, trust premises should be conveyed, so that same should be vested in surviving trustees and such new trustees or in such new trustees solely, on same trusts; A. died in lifetime of testator. Intention of testator that there should be three trustees of his will, and new trustee might be appointed in place of A. *Earl Lonsdale v. Beckett*, 342
- Practice in claims for appointment of new trustees, 572
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- Vendor and Purchaser**—Conditions of sale provided for interest on purchase-money until payment. Delay having arisen by default of vendors, purchaser paid balance of purchase-money into private bank to separate account at 2½ per cent. Either time for payment of interest at prescribed rate not begin to run until complete title shown, or purchaser entitled to compensation out of his purchase-money for damage sustained by him, by reason of vendors not having fulfilled their part of contract; but purchaser not entitled to compensation for unproductiveness of purchase-money, investment being his voluntary act. *De Visme v. De Visme*, 52
- Liability of purchaser to make good accidents to buildings before sale completed. Possession belongs to vendor till payment of purchase-money, subject to his accounting for rents received. Estate and not purchaser liable for costs of trustee, in whom legal estate vested. From what time interest payable. *Robertson v. Skelton*, 140
- Case in which purchaser considered to have knowledge which should have led him to further inquiry; and therefore affected with constructive notice of plaintiff's equitable title under alleged agreement; and Court directed issues to ascertain facts. *Penny v. Watts*, 212
- Memorandum of agreement signed by both parties for sale and purchase of fixtures, &c. in leasehold house, and for purchaser to take an assignment of vendor's interest in premises, is a contract, on part of purchaser, to take an assignment of lease of premises. Purchaser having requested vendor to prepare assignment by indorsement *totidem verbis* with that to himself (the vendor), purchaser cannot afterwards require production of original lessor's title. Lease contained covenant against assignment without licence of lessors; purchaser inspected lease and indorsement upon it, from which it appeared that licence necessary, but alleged he did not observe covenant, and only looked at term and rent. Purchaser held to have had notice of covenant. *Smith v. Capron*, 322
- Upon petition, asking for leave to resell one of two lots in consequence of purchaser's unwillingness to complete purchase, it was ascertained that on one of the lots a reversionary interest had fallen into possession, and that money had been paid into court, which made the purchase desirable. Purchaser, not being discharged, still entitled to complete purchase; but Court imposed terms, and limited time for payment into court of balance beyond what had been received for reversionary interest. *Robertson v. Skelton*, 561
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- Testator gave estates to trustee upon certain trusts and after deductions to pay five-eighth parts of net rents unto his wife for her own use during her life, and other three-eighths to his daughters. Wife received her portion of net rents up to Lady-day 1847, and died on 24th of July 1847. Tenant for life not affected by payments of rents, as they were payable to trustee. Right of trustee to pay arose with his receipt. Right of wife to receive accrued under will. Nothing to prevent payments being made at several periods; and personal representatives entitled to proportionate part of rents up to and including day of death of wife. *Knicht v. Boughton*, 66
- Testator, the subject of a commission of lunacy, at time of making his will, and up to his death, being seised of large real estates, made his will, whereby after giving certain benefits to daughter and heiress-at-law, he declared, that if she or her

husband, or any person on their or either of their behalf, should dispute his will, or if any proceedings should be taken by any person whomsoever, whereby his daughter or her husband might attain larger interest in his estates than that given by his will, and she and her husband should not disavow or resist such proceedings, then he revoked benefits thereby given to her. Daughter was married at date of will, and, on her marriage, articles were executed, by which husband covenanted with A. B., trustee, to settle her present and future property upon trusts for benefit of himself, his wife, and their issue. There was no issue of their marriage. In suit by trustees of will, to establish it, evidence on part of plaintiffs, went to prove competency of testator, and no evidence to contrary; and heiress-at-law did not ask an issue. A. B. sufficient *prima facie* title as trustee for unborn issue; and Court directed issue *devisavit vel non*, plaintiffs in equity to be plaintiffs at law, and A. B. defendant at law. *Cooke v. Turner*, 81

Will (continued)—Testatrix gave moiety of residue of her estate upon trust for her life, and, after death of W, to A. at time his other legacy became payable (at age of twenty-one), and in case of his death without leaving lawful issue, same to be equally divided between B, C. and D. A. survived testatrix, attained twenty-one, and died in lifetime of W. without having been married. Share of residue vested in him absolutely, and did not go over to B, C. and D. *Woodburne v. Woodburne*, 88

— Expression of intention to pay off mortgage supported from context, and personal estate not exonerated. Annuities charged on real estate in exoneration of personal estate. *Lomax v. Lomax*, 137

— Testatrix gave 1,000*l.* consols to trustees, upon trust to apply dividends to providing each poor inmate of D. Union Workhouse above sixty with a pint of porter. By Poor Law Amendment Act introduction of fermented liquors into workhouse forbidden. Trustees having submitted to act as Court should direct, order made that dividends be paid to vicar of parish of B. to be applied by him pursuant to provisions of will, so far as same consistent with Poor Law Amendment Act. *Attorney General v. Vint*, 150

— Testator gave all his stock in trade, book debts, securities for money, money in funds, and all his household goods, &c. to his wife. Also he gave whatever money he had in the Bank, or invested on any security, and all residue of his personal and testamentary estate, goods, chattels, and credits, to his trustees upon certain trusts therein mentioned. Legal estate in messuages, conveyed to testator upon trust to pay himself 300*l.* and surplus to person conveying same, not pass. *Re Gorfett's Trust*, 173

— Testator, a publican carrying on business at a leasehold house, bequeaths house to A, with business, stock, and outstanding debts, conditionally on his purchasing annuity for S. H. for her life, or 500*l.* in money. A. is not bound to pay debts due from testator in his business, and S. H. has not the option of taking the 500*l.* *Wilson v. Wilson*, 279

— Testatrix, under a power, charged estates with a sum of money, and directed it to be paid to such of her mother's relations as her husband should by will appoint, and for want of such appointment then to her mother's relations according to Statute of Distributions. The husband having survived, but failing to appoint to any relation of his wife's mother, the next-of-kin of mother living at death of husband entitled to fund. *Davidson v. Proctor*, 395

— Testator bequeathed residue of personal property to trustees upon trust to apply dividends and income in maintenance and education of children of his two sons until they severally attained twenty-one years of age; and when each grandchild attained that age to raise and pay 2,000*l.* to each, and when all the grandchildren attained that age to pay surplus of residuary estate to them as tenants in common, each grandchild upon age of twenty-one years to take vested interest. Children of one of sons living at death of testator, having attained twenty-one (the other son being then a bachelor), not entitled to division of trust funds in exclusion of any other children who might be born of either of sons; but entitled to whole of income, and would be entitled to principal if no other such child should be born and attain twenty-one. *Mainwaring v. Beevor*, 396

— Testator directed trustees to pay annuity to his nephew for life, without anticipation, &c. or until bankruptcy or insolvency; and in case of bankruptcy or insolvency to pay same to his wife for personal support of herself and him and his children, during life of him and her and survivor, with power, in case of alienation, &c., by them or either of them, to trustees to withhold payment of annuity, or to apply it towards support of their children. Nephew took benefit of Insolvent Debtors Act in lifetime of his first wife, living at testator's decease, and afterwards married a second wife. Second wife took no interest in the annuity, and upon death of first wife, their children entitled in equal shares to annuity during his life, and upon his decease fund upon which it was secured fell into residue of testator's estate. *Boreham v. Bignall*, 461

— If the thing intended to be given is sufficiently indicated, an additional erroneous description of value of subject-matter will not vitiate the gift. *Purchase v. Shallis*, 518

— Testator, by will, gave interest of monies invested by him in certain loan societies (naming them) to his wife for life, with remainder over; he then gave all monies belonging to him "in the Friendly Society called the Lodge of Friends Society and all other societies" to his wife absolutely. Words "all other societies" meant societies *ejusdem generis* with that immediately preceding, namely, friendly societies, and widow took life interest only in monies invested in loan societies. Where words of a will admit of two interpretations, Court will prefer that construction which will make the whole will consistent. *Marks v. Solomons*, 555

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Erratum.—Chancery, page 371, first line of the head note to the case of *Johnson v. Johnson*,
for "Suit abated after decree," read *Suit abated before decree*.

LONDON:
J. HOLMES, 4, TOOK'S COURT, CHANCERY LANE.



